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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76- **76-4161**

MADELINE BUCHANAN, ET AL.,

Appellants,

VS.

BRENDA EVANS, ET AL.,

Appellees.

JURISDICTIONAL STATEMENT.

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No. 76

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Appellants,

vs.

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Appellees.

JURISDICTIONAL STATEMENT.

May It Please the Court:

The defendants appeal from the judgment entered on 15 June 1976 of the three-judge District Court for the District of Delaware ordering the defendants to establish an interdistrict desegregation plan and enjoining the enforcement of the Educational Advancement Act of 1968, 14 Del. C. §§ 1004(c)(2) and 1004(c)(4). A copy of the judgment is set out in Appendix B hereto, at page A72.

OPINIONS BELOW.

The majority and dissenting and concurring opinions in the three-judge court for the District of Delaware are not yet reported. They are set out in Appendix A hereto, at pp. A1-A71. The opinions on the interlocutory judgment of the District Court

ordering the parties to submit proposed interdistrict and single-district desegregation plans for the Wilmington schools are reported at 379 F. Supp. 1218 (D. Del. 1974) and 393 F. Supp. 428 (D. Del. 1975). An appeal from the interlocutory judgment was taken to this Court, which summarily affirmed that judgment. 423 U. S. 963 (1975).

JURISDICTION.

The judgment of the three-judge court was entered on 15 June 1976. Appellants filed a Notice of Appeal on 22 July 1976. A copy of the Notice of Appeal is set out in Appendix C hereto, at page A76. This Court has jurisdiction pursuant to 28 U. S. C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EDUCATIONAL ADVANCEMENT ACT OF 1968, 14 Del. C. §§ 1004(c)(2), (4):

(c) On or before March 1, 1969, the State Board of Education shall meet and adopt a final plan of reorganization of school districts which it deems wise and in the best interests of the educational system of this State; provided, that no plan of reorganization of school districts shall be adopted which fails to meet the following requirements: ...

(2) Each proposed school district including more than one compact former school district shall have a pupil

enrollment of not less than 1900 nor more than 12,000 in grades one through twelve. "Pupil enrollment" as used in this subsection means enrollment as of September 30, 1968. Excluding vocational-technical districts there shall be no fewer than 20 nor more than 25 reorganized school districts. ...

(4) The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits. ...

QUESTIONS PRESENTED.

1. Can a district court in a school desegregation case validly order "interdistrict relief" where it has specifically found that the alleged "interdistrict violation" on which that relief is predicated was not "racially motivated" and there is no evidence of any "racial effect"?

2. Can a district court in a school desegregation case order the dissolution of eleven existing school districts, the establishment of a single school district in their place, and a racial quota of black students in every grade in every school in the enlarged district of not less than 10% nor more than 35%?

3. Does the finding of a "constitutional violation" in a desegregation case license a trial court to order any remedy it thinks appropriate, or must the remedy be directed to curing the alleged wrong?

STATEMENT.

This is the latest in a long series of school desegregation decisions in the United States District Court for the District of Delaware. As the trial court noted, App. at A3, n. 7, the analogy to the Richmond litigation is strong. Indeed, it is exact, but for two distinguishing features: (1) The conclusion of the lower court here is directly in conflict with the judgment of the Court of Appeals for the Fourth Circuit in *Bradley v. School Board of the City of Richmond*, 462 F. 2d 1058 (4th Cir. 1972)

("Richmond"), *aff'd by equally divided Court*, 412 U. S. 92 (1973) (Mr. Justice Powell not participating), and with the decision of this Court in *Milliken v. Bradley*, 418 U. S. 717 (1974) ("Detroit"). (2) Unlike the Virginia situation, where the trial court charged the State with bad faith, *Richmond*, 338 F. Supp. at 92-97, the lower court here said: "The Court also takes judicial notice that in the past the State has implemented desegregation decisions in good faith." App. at A59. HEW noted that Delaware was "the first border state which had completely eradicated the dual system." 393 F. Supp. at 451 (Judge Layton dissenting).

The origins of this lawsuit go back to 1956, consequent upon the affirmance by this Court in *Brown v. Board of Education*, 347 U. S. 483 (1954), of the decision by the Supreme Court of Delaware in *Gebhart v. Belton*, 91 A. 2d 137 (Del. 1952), that "separate but equal" schools did not satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment. Despite the apparent length of this litigation, see App. at A3, n. 7, until this case was reopened in 1971 with the filing of new petitions, there was no contention ever put forward in these judicial proceedings that the schools of Wilmington, or the suburban school districts of New Castle County involved in this case, were in any way in violation of the Fourteenth Amendment.

The district court had entered its state-wide desegregation order in 1961. 195 F. Supp. at 321. Its plan called for an end to *de jure* segregation in all public schools throughout the state of Delaware, an objective which, the court itself has noted, was attained: At least since 1967, there has been no *de jure* segregation in the Delaware schools. 379 F. Supp. at 1225. The district court's 1961 plan called for the consolidation of many of Delaware's school districts. As the trial court stated, however, its plan "did not provide for the consolidation of Wilmington with any other district." *Id.* at 1221, n. 2.

In 1968, the Delaware legislature adopted a one-year school reorganization plan designed to create efficient, consolidated

school districts serving controlled and limited numbers of students; it barred any local school system serving more than 12,000 pupils from entering into a consolidation. This was the Educational Advancement Act, 14 Del. C. §§ 1001 *et seq.*, which also excluded Wilmington from the predominantly rural reorganization program. In spite of the trial court's own refusal in 1961 to mandate the consolidation or dissolution of the Wilmington school district, and although it found the 1968 statute to be non-racially motivated and directed at the resolution of real organizational problems, it now holds that the legislature's omission in 1968 constituted a violation of the Fourteenth Amendment.

The factual basis for complaint here is that the Wilmington School District's student population changed between 1956, when this action was commenced, and 1973, when trial in the Wilmington phase was held, from 31.6% black to 82.7% black. 379 F. Supp. at 1228. This change was not unique to Wilmington; it was a common phenomenon in almost every central city which experienced heavy suburban growth. See U. S. Bureau of the Census, Statistical Abstract of the United States, 1974 (95th annual ed.), at 866-67, 886-87, 906-07. But, as even the trial court acknowledged, the mere fact of racial disparity between the suburban and urban school populations cannot afford a predicate for ordering interdistrict consolidation for the purpose of alleviating the black concentration in the urban schools. Nevertheless, it did order such relief, although the only grounds it could find for doing so had been rejected by this Court in *Detroit* and by the Fourth Circuit in *Richmond*.

The trial court divided its proceedings into two aspects. The first set of hearings was concerned with the question of whether the Wilmington concentration of blacks was attributable to constitutional violations by the defendants. The second was concerned with the question of an appropriate remedy for the alleged constitutional violations.

At the end of the first phase, the trial court held that the defendants were guilty of constitutional violations, largely on the basis of the fact that the Educational Advancement Act preserved Wilmington from consolidation with other school districts. The trial court held, however, that the statute whose enforcement it enjoined was not racially motivated. See *infra* at 10-11. It also purported to find constitutional violations because of housing segregation which it attributed to the State and because in the past, before the school system was desegregated by the court's 1961 plan, there had been inter-district violations. 393 F. Supp. at 433-438. The court, however, specifically found that each of the suburban districts concerned in this case was operating a unitary school system and none was guilty of any interdistrict violations since 1961. 393 F. Supp. at 437, n. 19, and accompanying text.

The trial court thereupon entered an interlocutory judgment ordering all parties concerned to submit both intradistrict ("Wilmington only") and interdistrict plans. 393 F. Supp. 428. Defendants appealed to this Court from that interlocutory judgment. This Court affirmed without opinion* over the dissent of Mr. Justice Rehnquist, who was joined by the Chief Justice and Mr. Justice Powell, all of whom thought the statute could not sustain the judgment because it was "*functus officio*."** 423 U. S. 963, at 968 (1975).***

* "In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. *Alabama v. United States*, 279 U. S. 229 (1929); *United States v. Corrick*, 298 U. S. 435 (1936); *United Fuel Gas Co. v. Public Service Comm'n of West Virginia*, 278 U. S. 322 (1929); *National Fire Insurance Co. of Hartford v. Thompson*, 281 U. S. 331 (1930)." *Brown v. Chote*, 411 U. S. 452, 457 (1973).

** The three-judge court, however, has interpreted the Educational Advancement Act as still controlling the organization of the Delaware school system. Thus, in its opinion on which its final judgment is based, it attempted to conform the remedy to the demands of that statute to the extent that the court thought it possible to do so. See App. at A28-A29; A32-A34; A45-A47. In the absence of a decision by the state court to the contrary, this interpretation of the statute by

(Continued on next page)

Following the affirmance of the interlocutory order, the trial court held hearings on the remedy, entering its final judgment on 15 June 1976. The remedy ultimately imposed consisted of just two substantive ingredients. First, the district court ordered that all but one of the defendant school districts be collapsed into a single superdistrict. Where previously there were eleven school systems, now there would be one central administration stretching over more than 250 miles of urban, suburban, and rural territory. Where previously no school district's pupil population exceeded 12,000—with the exception of Newark and Wilmington, each of which had about 15,000—now a solitary school system including both Newark and Wilmington would have to accommodate more than 80,000 widely-dispersed students. This consolidation is to be effected not merely for purposes of pupil assignment, but for all functions of school government. Local school boards are to be dissolved, and with them their individualized programs of administration, finance, and curriculum, all of which were until now subject to local control. In their place now suddenly looms a new, judge-made branch of government which exceeds all reasonable relation to the proportions normally obtaining among the other institutions of the state.

Second, the trial court ordered that pupil assignments within this extensive area conform to a fixed ratio of the races.

(Continued from preceding page)

the district court is controlling. See, e.g. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 74-75 (1937). If the state statute is *functus officio*, however, it can hardly serve as a predicate for the remedy devised by the trial court.

*** The judgment below from which this appeal is taken was rendered by a three-judge district court. Appeal from such a judgment lies to this Court. 28 U. S. C. § 1253. In light of the position taken by the dissenting Justices on the first appeal, however, appellants have also filed an appeal with the Court of Appeals for the Third Circuit. That appeal has been stayed pending this Court's disposition of this Jurisdictional Statement. If this Court should determine that a direct appeal is inappropriate, it could treat this Jurisdictional Statement as a Petition for Certiorari and grant the petition prior to judgment by the Court of Appeals. U. S. Supreme Court Rules, Rule 20.

As Judge Layton put it in his dissent below, "The majority opinion requires that the racial composition of every school in the desegregation area, Northern New Castle County, reflect the racial mix of the desegregation area." App. at A66. The majority opinion, purporting to eschew a "strict quota," nevertheless ruled that "the Court will consider that any school whose enrollments in each grade range between 10 and 35% black to be a *prima facie* desegregated." [sic]. App. at A43.

Within the confines of a single school district and a 10 to 35% black quota for every grade in every school, the State and the existent school districts, which are to be destroyed when the new district comes into existence, are to exercise their discretion as to educational, administrative, and fiscal programs.

Appeal is taken from this judgment.

THE QUESTIONS RAISED BY THIS APPEAL ARE SUBSTANTIAL.

The issues presented by this case are archetypes of those facing every major city in the United States that is or will be faced with a constitutional desegregation action. In Wilmington, as in Richmond, and as in Detroit, the center city has become increasingly black while the suburbs remain predominantly white. In Wilmington, as in Richmond, and as in Detroit, there is found to be a failure by government to dissipate housing patterns that reflect urban racial separations. Cf. *Hills v. Gautreaux*, _____ U. S. _____ (1976), 44 USLW 4480. Just as the Wilmington case does not differ from the Richmond and Detroit cases, it will not be different from those brought or to be brought in almost any large-sized city of the United States. Certainly the time has come when it is appropriate for the Court to decide, one way or another, whether this factual situation permits a trial court to dissolve the existing local governmental units, replace them with one of a court's own creation, and order the dissemination of the children among all the schools in the judicially-created district accord-

ing to the racial proportions that exist in the enlarged "community." While we think it clear that this Court has already forbidden such judicial action, the court below ordered a solution inconsistent with this Court's prior decisions. The issues will not be put to rest until this Court speaks authoritatively once more. Even a reversal of this Court's decision in *Milliken* is to be preferred to the uncertainty that now reigns, an uncertainty that spawns social conflict.

I.

THERE IS NO CONSTITUTIONAL VIOLATION ON WHICH TO PREDICATE INTERDISTRICT RELIEF.

A. In Holding That There Was a Constitutional Violation in the Absence of "Discriminatory Racial Purpose," the Trial Court's Decision Is in Conflict with the Decision of This Court in Washington v. Davis and the Decision of the Court of Appeals for the Fourth Circuit in Bradley v. Richmond.

The finding of a constitutional violation by the district court rests largely on the proposition that the Educational Advancement Act inhibited the integration of the school children of Wilmington with those in other school districts. The trial court's proposal is hard to state, since there are neither facts nor argument to sustain the conclusion that in the absence of the Educational Advancement Act such integration of districts would have occurred.

The boundaries of the Wilmington school district are coterminous with the boundaries of the City of Wilmington and have been since 1905. Between 1905 and the ruling below, there has never been a suggestion that the school boundaries be amended to remove portions of the Wilmington district or add to it. Nevertheless, the trial court held that the Educational Advancement Act by excluding Wilmington from the statutory program of consolidating small school districts—no one had

advocated its inclusion—constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. “This Court ruled that the exclusion of Wilmington from the process of reorganization by statute was an unconstitutional racial classification, and ‘contributed to the separation of races by . . . redrawing [sic] district lines.’” App. at A6.

This holding is in direct conflict with that of the Fourth Circuit where the same contention was made about the failure of the State to redraw the boundary lines of the city and school district of Richmond. *Bradley v. School Board of the City of Richmond*, 462 F. 2d 1058, 1067 (4th Cir. 1972), aff’d by equally divided Court, 412 U. S. 92 (1973).*

The holding below is more egregious, however, because the trial court itself held that the legislature had no discriminatory purpose or motive in passing the legislation in question. “It is true that in the last opinion we refused to hold that the Educational Advancement Act was passed for racially discriminatory purposes.” App. at A55. The fact is that the trial court had held directly that there was no such motive or purpose (393 F. Supp. at 439):

We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory. To be sure, all legislators in Delaware in 1968 knew

* The similarity of the Virginia statute and the Educational Advancement Act is striking:

Under the new Constitution of Virginia the State Board is given power to divide the Commonwealth into school divisions subject to “such criteria and conditions as the General Assembly may prescribe.” At its extra session of 1971, the General Assembly enacted into law Virginia Code § 22-30:

(1) No school division shall be composed of more than one county or city.

(1) No school division shall be composed of a county or city and any one of the following towns: Abingdon, Cape Charles, Colonial Beach, Fries, Poquoson, Saltville, or West Point. [462 F. 2d at 1067.]

that Wilmington had a large black population, and most legislators may have known that the Wilmington School District was predominantly black. On the other hand, the focus of the legislature’s concern in developing the consolidation provisions of the Educational Advancement Act was on small, weak, ineffective school districts, and while the effectiveness of schooling in Wilmington at this time has been disputed, it is clear that Wilmington had larger staffs and better programs than many Delaware school districts. Moreover, Wilmington had historically been treated distinctively in Delaware education, and there is evidence that its representatives were unwilling to forego certain aspects of this special treatment. No language in the provisions at issue makes any reference to race, nor evidently, did the legislative debates over the Act contain any reference to race. Finally, all Wilmington legislators, black and white, voted for the Educational Advancement Act. In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization. Effective, as well as intentional racial classifications, however, require special scrutiny under the Equal Protection Clause.

Thus, the judgment of the court below is in square conflict with the decisions of this Court as to the necessity for purposeful discriminatory action as a predicate for judicial relief. In *Washington v. Davis*, _____ U. S. _____ (1976), 44 USLW 4789, 4791-4792, this Court said:

Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents’ favor. Although the petition for certiorari did not present this ground for reversal, our Rule 40(1)(d)(2) provides that we “may notice a plain error not presented,” and this is an appropriate occasion to invoke the rule. . . .

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . But our

cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. . . .

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action . . . the differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate." *Keyes v. School District No. 1*, 413 U.S. 189, 205, 208 (1973). See also *id.*, at 199, 211, 213. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "the acceptance of appellant's constitutional theory would render suspect each difference in treatment among the grant classes, however lacking the racial motivation and however rational the treatment might be." *Jefferson v. Hackney*, 406 U. S. 535, 548 (1972). And compare *Hunter v. Erickson*, 393 U.S. 385 (1969), with *James v. Valtierra*, 402 U. S. 137 (1971).

The key analytical pronouncement of the trial court in the present case is sharply dissonant from the teaching of this Court in *Washington v. Davis*, *supra*, 44 USLW at 4793, where the Court said:

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

Contrast this Court's manifest restraint in *Washington v. Davis*, where it refused to rewrite a facially-valid and racially-neutral law, with the cavalier approach toward cause and effect which characterizes the pattern of decision below in the case at bar:

Whether or not the Board would have been required to adopt a desegregation plan beyond the boundaries of Wilmington in the absence of the Educational Advancement Act, it is clear that the Act made consolidation promoting racial balance substantially less accessible than other educational strategies. Because the Educational Advancement Act, racially neutral on its face, had a significant racial impact on the policies of the State Board of Education, it constitutes a suspect classification. (393 F. Supp. at 442-443.)

The trial court in this case has thus determined to find a constitutional violation, while at the same time admitting that it can find no racially-discriminatory purpose behind any of the conduct of the Delaware schools. This should suffer the same disapprobation voiced by this Court in *Washington v. Davis*, *supra*, 44 USLW at 4793-4794:

[T]o the extent that those [lower court] cases rested on or expressed the view that proof of racially discriminatory purpose is unnecessary in making out an equal protection violation, we are in disagreement.

The court below is guilty, therefore, of such plain error that in *Washington v. Davis* invoked this Court's review even though the issue had not been raised. The rejection of the requirement of intentional racial discrimination is a rejection of this Court's reading of the Constitution and calls for review and reversal here.

B. In Holding That Evidence of Segregatory Housing Practices Constituted a "Constitutional Violation" Justifying an Interdistrict Remedy, the Decision Below Is in Conflict with This Court's Decision in *Milliken* and the Fourth Circuit's Judgment in *Richmond*.

The ruling of the trial court that "the racial identifiability of the suburbs and the city" were attributable to the State "through enforcement of racial covenants, zoning and encouragement and support of private discrimination in housing" (App. at A18; 393 F. Supp. at 437-38), parallels the conclusions of the trial courts

in the *Detroit* and *Richmond* cases, although there was even less evidence in this case to support that conclusion. See *Detroit*, 338 F. Supp. at 587; *Richmond*, 338 F. Supp. at 212-29. This Court has demanded a more careful distinction between the conduct of school authorities and the behavior of private persons, as they might give rise to a public school system's liability for a constitutional violation, than the court below has drawn. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 23 (1971), this Court said:

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly on account of race; it does not and cannot embrace all the problems of racial prejudice even when those problems contribute to disproportionate racial concentrations in some schools.

In *Detroit*, this Court found no adequate evidence to support an interdistrict remedy on the basis of the housing practices asserted. Mr. Justice Stewart's opinion, on which the trial court relied for finding liability on the basis of housing discrimination, said of the *Detroit* record—at least as strong for plaintiffs as this one: "No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity."* (418 U. S. at 756, n. 2). The Fourth Circuit was firm

* A strong advocate of the "metropolitanism" for school desegregation recognized that the evidence in *Detroit* on housing violations is as strong as you are likely to get. He would abolish the need for evidence of causation between housing separation and school segregation. He recognizes, but abhors, the Court's unwillingness to create a presumption of causation. But only if the Court overrules its earlier positions in *Detroit* and *Richmond* can the conclusion by the court below be allowed to stand. "One must remember that the two metropolitan cases to reach the Supreme Court, *Richmond*, Virginia, as well as *Detroit*, did contain considerable material along several of these lines of evidence. For example, the record of the *Richmond* case, in which Justice Stewart apparently also rejected a metropolitan remedy, was replete with evidence concerning naked dis-

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in rejecting the sufficiency of this kind of evidence to support an interdistrict remedy by integrating disparate school districts. See 462 F. 2d at 1066.

The lower court would place much reliance on the case of *Hills v. Gautreaux*, _____ U. S. _____ (1976), 44 USLW at 4487, as in effect overruling the conclusion in *Milliken* that housing violations do not justify school system reorganizations such as was ordered here. It rather reaffirmed *Milliken* than overruled it:

In contrast to the desegregation order in [the *Milliken*] case, a metropolitan relief order directed to HUD would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD.

In this case, of course, the full purpose and effect of the final decree is to destroy existent local school districts and replace them with "a vast new super school district." *Milliken*, 418 U. S. at 743. The lower court's judgment is, therefore, not only in conflict with the *Milliken* decision by this Court, with the *Richmond* decision by the Court of Appeals for the Fourth Circuit, but also with this Court's decision in *Hills v. Gautreaux*.

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crimination against blacks seeking housing in the two involved counties. . . . Recall, too, the extreme degree of housing segregation by race that typifies the Detroit metropolitan area." Pettigrew, *A Sociological View of the Post Milliken Era*, in *Milliken v. Bradley: The Implications for Metropolitan Desegregation*, Conference before the United States Commission on Civil Rights 62 (Washington, D. C. 1974). Pettigrew, of course, is an advocate of metropolitanism who supplied the evidence as plaintiff's expert in the *Richmond* case, and not an unbiased observer.

II.

**THE "RELIEF" AFFORDED BY THE TRIAL COURT
EXCEEDED ITS AUTHORITY UNDER THE DECISIONS
OF THIS COURT.**

**A. In the Absence of an "Interdistrict Violation," No "Inter-
district Remedy" May Be Imposed by a Federal Trial
Court.**

There can be no quarrel with the proposition that there must be an interdistrict violation to justify an interdistrict remedy. The Court made that requirement clear in *Milliken* (418 U. S. at 744-45):

Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation.

The decision below is inconsistent with this Court's ruling. There is no question but that the suburban districts have not committed any segregative acts on which to base an interdistrict remedy. Their innocence is proclaimed by the court below. See 393 F. Supp. 437, note 19. Nor is there any constitutional interdistrict violation that may be attributed to the State Board.

Assuming arguendo, however, that the Educational Advancement Act or the failure to provide public housing in the suburbs constituted an interdistrict violation, there is no showing in this record that these "racially discriminatory acts . . . have been a substantial cause of interdistrict segregation." "It is, indeed, a novel application of equitable power—not to mention a dubious extension of constitutional doctrine—to require so

much greater a degree of forced school integration than would have resulted from purely natural and neutral nonstate causes." (Powell, J., concurring in part and dissenting in part, *Keyes v. Denver School District No. 1*, 413 U. S. 189, 249 (1973)).

The minority opinion below clearly delineated the absence of any showing that the alleged violations could have been "a substantial cause of interdistrict segregation" (App. at A65-A66):

In this connection, [the majority] applied a sort of "but-for" test; that is, "but-for" the failure of the housing authorities to build cheap, low-cost housing in the County and "but-for" the EAA which tended to lock large numbers of Black students into Wilmington, the ratio of school children in the Wilmington schools today would be 80% White and 20% Black instead of 9.8% White and 84.7% Black. From this, and allowing a variable factor of 15%, it arrived at the conclusion that in desegregating Northern New Castle County, the number of Black students in any one school should not be less than 10%, nor exceed 35%. I simply cannot accept the majority's hypothesis. No testimony was put into the record in support of the conclusion that "but-for" the constitutional violation, Wilmington schools would still be 80% White and 20% Black. No evidence as to the number of available City, as compared with suburban, jobs was adduced. The record contains no prediction as to how many housing units would now be available to Blacks in the suburbs, had the housing authorities presented a vigorous, low-cost housing program. There is no analysis of the transportation available to Blacks who might rent low-cost housing. Nor has the recognized tendency of ethnic groups to live together in certain localities been taken into account. I concede that "but-for" the weak housing program and the unconstitutional feature of the EAA, there would be fewer Blacks today in the City but I doubt if the difference would be substantial, and in any case, there is no evidence indicating how these numbers could be calculated. As I view it, the result drawn by the majority from its "but-for" test represents no more than a bald assumption unsupported by evidence.

What the minority opinion did not point out was that there is no evidence that in the absence of EAA Wilmington would ever have been consolidated with other school districts. Indeed, the majority acknowledged that, "the record does not suggest that, but for the statutory exclusion from its reorganization authority, the State Board would necessarily have consolidated Wilmington with any other district." 393 F. Supp. at 442, n. 28. Wilmington was already by far one of the two largest school districts in the State; it already had greater fiscal support both from the State and the City than any other school district; it already had more teachers per student, more specialized programs, and a higher salary structure. The boundaries of the Wilmington school district have not been altered since 1905. There is nothing in the record to suggest that they would have been altered "but-for" the EAA.

This Court clearly stated in *Milliken*, in reliance on *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971), that the remedy should be confined to curing the wrong (418 U. S. at 744-746):

The controlling principle consistently expounded by our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. . . . the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.

This controlling principle was ignored by the lower court. There is no connection between the remedy adduced and the constitutional violations alleged. This is because the "constitutional violations" cannot be shown to have in any way contributed to the alleged segregation found by the trial court.

B. The Decision of the Trial Court Is in Conflict with the Decisions of This Court in Fixing a "Quota" for All Grades in All Schools in the Newly Created District.

There is no burking the fact that compulsory school busing was intended by this Court and by Congress to be the last resort and not the first. Any plan, such as the one approved by the trial court here, that demands a fixed quota of black and white students in every grade in every school—particularly in a district of the dimensions created by the court below—requires the most extensive busing rather than the least necessary to accomplish desegregation. But this Court has made it patent that a fixed quota such as imposed by the trial court below is invalid. In *Swann*, 402 U. S. at 24, this Court said:

If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

There is no way to read the holding of the trial court here except that it imposed a requirement of racial balance or racial mix in every class in every school in the expanded system.

Moreover, in its holding that a Wilmington only plan would not satisfy the constitutional requirements because some schools would "remain more than 90% minority," App. at A16, the decision of the court below is in conflict with recent judgments of both the Fifth and Sixth Circuits. See *Calhoun v. Cook*, 522 F. 2d 717 (5th Cir. 1975); *Mapp v. Board of Education of City of Chattanooga*, 525 F. 2d 169 (6th Cir. 1975).

C. In Destroying the Existent School Systems and Establishing Its Own Consolidated System, the Court Below Rejected the Decisions of This Court in Milliken v. Bradley and Hills v. Gautreaux.

The trial court undertook by way of remedy for some dubious constitutional violations a restructuring of the school systems of a major portion of the State of Delaware.* It did this in the face of this Court's commands against interference with local government units except to the extent absolutely necessary. As in *Milliken* (418 U. S. at 740):

[The court below] proceeded on an assumption that the [Wilmington] schools could not be truly desegregated—in their view of what constituted desegregation—unless the racial composition of the student body of each school reflected the racial composition of the population of the metropolitan area as a whole.

As did the lower courts in *Milliken*, the lower court here determined that “the entire northern New Castle area must be treated as one community in terms of its population characteristics, because that is the way it was perceived and treated by the State and its citizenry.” App. at A18. There is, of course, no showing that the northern New Castle area was ever treated as one community, any more than every urban-suburban complex, as in *Detroit* and *Richmond*, is so treated.

The trial court converted its tenuous finding of liability for a constitutional violation into a license for the wholesale reconstruction of a significant part of Delaware's local government. The court below chose to ignore the mandates of Delaware's constitution and state laws in favor of its own conviction of the propriety or utility of a “super-district,” something which this Court has said that trial courts are not qualified to do:

* In the recently completed school year (1975-76), for example, the judicially-created super-district would have enrolled more than 63% of the students in the public schools of the entire state of Delaware. D. D. I. Remedy Ex. 25.

This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives. (*Milliken*, 418 U. S. at 744.)

The trial court purported to derive its authority for this restructuring of the public school system of Delaware from this Court's decision in *Hills v. Gautreaux*, *supra*, 44 USLW at 4484, n. 13. Nothing could be clearer from the language of that opinion than that it afforded no such authority:

Although the State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, 418 US, at 734-735, n 16, the Court in *Milliken* concluded that the interdistrict order was a wrongful exercise of judicial power because prior cases had established that such violations are to be dealt with in terms of “an established geographic and administrative school system,” *id.*, at 746, and because the State's educational structure vested substantial independent control over school affairs in the local school districts. See *id.*, at 742-744. In *Milliken*, a consolidation order directed against the State would of necessity have abrogated the rights and powers of the suburban school districts under Michigan law. See *id.*, at 742 n. 20. Here, by contrast, a metropolitan area remedy involving HUD need not displace the rights and powers accorded suburban governmental entities under federal or state law.

CONCLUSION.

The decree below should be reviewed and reversed for the same reasons that the Detroit interdistrict remedy judgment was reviewed and reversed. In the words of this Court in *Hills v. Gautreaux*, *supra*, 44 USLW at 4483:

The desegregation order [here] requiring the consolidation of local school districts in the [Wilmington] metropolitan area thus constituted direct federal judicial interference with local governmental entities without the necessary predicate

of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the [Wilmington] school officials' unconstitutional conduct. Under these circumstances, . . . the inter-district decree was impermissible because it was not commensurate with the constitutional violation to be repaired.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT,
For the District of Delaware.

BRENDA EVANS, et al.,
Plaintiffs,
vs.

MADELINE BUCHANAN, et al.,
Defendants.

Civil Action
Nos. 1816-1822.

Before GIBBONS, *Circuit Judge*, WRIGHT, *Senior District Judge*,
and LAYTON, *Senior District Judge*.

OPINION.

Wilmington, Delaware
May 19, 1976

WRIGHT, *Senior District Judge*.

This case arises under the continuing jurisdiction of this Court to implement prior opinions finding unconstitutional segregation in the public schools in Delaware.¹ The instant opinion concerns the choice of an appropriate remedy for constitutional violations in the operation of the schools of Wilmington and the surrounding suburban districts and the requirement of an inter-district remedy. In prior opinions, this Court ruled that the segregation of the Wilmington schools was never erased;² and that this segregation resulted from a combination of factors, including demographic and housing

1. See, *Evans v. Buchanan*, 379 F. Supp. 1218, 1220-21 (D. Del. 1974), for a recitation of the previous course of this litigation.

2. 379 F. Supp. at 1223.

patterns initiated and supported by state action; and the redrawing of school district lines during a period of consolidation and reorganization under the Educational Advancement Act, 14 Del. C. §§ 1001, *et seq.*³ Having found a violation which included inter-district effects, we ruled that under the guidelines laid down in *Milliken v. Bradley*, 418 U. S. 717 (1974), [hereinafter "*Milliken*"] the Court could consider both inter- and intra-district remedies for the constitutional deprivation. 393 F. Supp. at 446-47, *aff'd. per curiam*, U. S. (No. 74-1418), 44 U. S. L. W. 3299 (November 17, 1975).

Following the ruling of this Court on the liability phase, the parties⁴ were directed to develop plans to remedy the violations found, using both inter- and intra-district methods. These plans were to be submitted through the State Board of Education and its staff, the Department of Public Instruction, for professional comment and evaluation. The State Board was then to recom-

3. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975).

4. The original parties before the Court included the purported class of black children of Wilmington, and the State Board of Education. The Wilmington School Board intervened as a party plaintiff in the liability phase, and has continued in the remedy phase of the hearings. A group representing the interests of Hispanic and bilingual children [hereinafter "*Hispanic Intervenors*"] was permitted to intervene by the Court in the remedy phase solely for the purpose of protecting the bilingual program as it presently operates from disruption by any remedy ordered. See Transcript of Hearings of the Remedy Phase at 203-04 [hereinafter "*Tr.*"]. The plaintiff class representing black children has not previously been certified under Rule 23, Fed. R. Civ. Proc., and a motion is pending before the Court concerning whether the named representatives and their attorneys adequately and fairly represent the interests of the purported class. See, *infra*, Part II.

The Court after its first opinion in this matter, and in light of the decision in *Milliken*, allowed each of the surrounding suburban school districts to intervene as party defendants. 393 F. Supp. at 430, and n. 1. In addition to the districts named therein, the New Castle County Vocational-Technical School Board has intervened in the remedy phase. Other interested groups, including groups of concerned parents on various sides of the issue; teachers' unions; and special committees have been permitted to take part as amici, by filings briefs only.

mend to the Court the proposals it thought best.⁵ These original suggestions, some nineteen in number were submitted to the Court in August, 1975.⁶

Three weeks of evidentiary hearings followed. During the course of those hearings, additions, changes and shifts in emphasis were made to many of the plans. Those presently before the Court, therefore, differ in several respects from those originally submitted. All the factual and legal issues have been briefed, and the matter is ready for decision.

I. *Factual Background.*

There is no need to discuss here either the prior history of segregated schools in Delaware or New Castle County, nor to recount in detail the prior findings of this Court, since they are set out in prior opinions.⁷ Nonetheless, a short discussion of

5. Throughout the course of this litigation, the Courts have continually held that the primary burden of the duty to segregate rests with the State Board. See, e.g., 393 F. Supp. at 430.

It was also apparent that any plans submitted should be reviewed by professional educators in order to sift out those plans which were unworkable.

6. The proposals were developed by the professional staff of the State Board; other professional educators; individual citizens and interested groups. See Docket Items No. 332-41.

7. See 393 F. Supp. 428 and 379 F. Supp. 1218. It should be noted that at the time of *Brown v. Board of Education* [*Brown I.*], 347 U. S. 483 (1954), Delaware by statute required the maintenance of separate schools; and *Gebhart v. Belton*, 91 A. 2d 137 (Del. 1952) (holding that separate schools were "unequal" under *Plessy v. Ferguson*) was a companion case to *Brown I.* Since that time, there have been eleven reported decisions by this Court and the Third Circuit with regard to this case. See, 393 F. Supp. 428; 379 F. Supp. 1218; 207 F. Supp. 820 (D. Del. 1962); 195 F. Supp. 321 (D. Del. 1961); 281 F. 2d 385 (3rd Cir. 1960); 173 F. Supp. 891 (D. Del. 1959); 172 F. Supp. 508 (D. Del. 1959); 256 F. 2d 688 (3rd Cir. 1958); 152 F. Supp. 886 (D. Del. 1957); 149 F. Supp. 376 (D. Del. 1957); 145 F. Supp. 873 (D. Del. 1956).

In this sense, Delaware has much in common with some other areas which have been the subject of school litigation for much of the last two decades. See, e.g., Leedes & O'Fallon, *School Desegregation in Richmond: A Case History*, 10 Univ. of Rich. L. Rev. 1 (1975).

some of the facts found in prior opinions will aid in the understanding of the opinion.⁸

New Castle County, Delaware, is some four hundred forty-three square miles in area, and northern New Castle County, the area primarily concerned in the opinion, is some two hundred fifty-one square miles in area.⁹ This area of Northern New County has a public school population of 80,678 of whom 63,370 or 78.5% are white; 15,722 or 19.4% are black; and the remainder of whom are other minorities including American Indian (89 or .1%), Hispanic (1,120 or 1.38%) and Oriental

8. Several types of abbreviations are used throughout this Opinion to refer to documents introduced in the case, etc. All evidentiary material admitted in the most recent phase of the hearings is identified by the inclusion of the abbreviation "Rem." in the reference, and further identified by the designation of the party introducing them, and the status of the party as defendant or plaintiff. Thus, "D. DPI. Rem. No. 24" refers to Exhibit 24 introduced in the Remedy phase by the State Defendant, the Department of Public Instruction; D. Newark Rem. No. 1 refers to the Exhibit No. 1 introduced by the defendant school district of Newark; Int. Pl. Rem. No. 1 refers to Exhibit No. 1 introduced by the intervening school Board of Wilmington, etc.

Exhibits introduced at prior phases are so identified. Those from the liability phase are identified as "Exh. (liability phase)". Those from prior proceedings not directly concerned with the present relief are identified by the year in which the hearings were held.

9. See 393 F. Supp. at 432; PX 23-0 (Liability Hearing) at back cover, for figures and their derivation. The remaining area above the 251 square miles is contained in the Smyrna School District, only half of which lies in New Castle County, and the Appoquinimink School District which occupies the next southernmost tier of the county. *Id.* Only one plan before the Court urged the inclusion of Appoquinimink, and under that plan, it was to be an "attendance area" complete unto itself. See, D. DeLaWarr Rem. No. 3.

Since under no plan proposed to the Court would Appoquinimink be a part of any transfer of students, or other remedy of the violation found in the prior opinions, and for other reasons discussed *infra*, pp. 53-54 *et seq.*, the Court has focused its attention on northern New Castle County, comprised of the Districts of Alfred I. DuPont; Alexis I. DuPont; Claymont; Conrad DeLaWarr; Marshallton-McKean; Mount Pleasant; Newark; New Castle-Gunning Bedford; Stanton and Wilmington. The references in this opinion to the Northern New Castle County area, unless otherwise specified, should be understood as descriptive of that area.

(377 or .46%).¹⁰ Within the area, 11,733 or 74.6% of the black students attend school in the Wilmington District. If the only other majority black school district in the area, DeLaWarr, is added to Wilmington, 13,473 or 85.6% of the black students in the northern County area attend school in those two districts.

The apparent contrast can be made even plainer by comparing the Wilmington and DeLaWarr enrollments to the other Northern New Castle County districts. Wilmington Public Schools are 84.7% black; DeLaWarr Public Schools are 54.9% black. No other Northern New Castle District is less than 90% white, and most are significantly higher.¹¹

Delaware has a long history of using small school districts, and it became apparent during the post-war period that many of these districts could not support a full educational program. In common with many other states, Delaware has, over the years, consolidated many of these smaller districts, some for financial reasons, others for purposes of required desegregation.¹² A comparison of a map of the school districts comprising the northern County area shows some nineteen schools districts in

10. The figures are derived by calculation from data given in D. DPI. Rem. No. 24, the final enrollment figures for 1975 broken down by race.

11. See D. DPI. Rem. No. 24. Alexis I. DuPont is 93.8% white; Alfred I. DuPont is 97.8% white; Claymont is 94.9% white; Conrad, 95.9%; Marshallton-McKean, 94.9%; Mount Pleasant, 96%; New Castle-Gunning Bedford, 92.9%; Newark, 94.2%; Stanton, 98.1%.

It should also be pointed out that the Wilmington schools house 746, or 66.1% of the Hispanic students in the same area.

Of course, the existence of a disparity in the racial characteristics of the population of the city and the suburbs is not a constitutional violation standing alone. Nor do we impose a remedy solely because of the existence of such a disparity. See Parts III, IV, *infra*. The foregoing facts are set out solely as an aid and to set the context of the violations previously found.

12. See generally, PX 23-K (liability phase) at 12, 13. In some instances, the prior school districts had comprised a "white" district and a "black" district within coterminous boundaries operating separate schools. See *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962).

1959¹³ to twelve districts in the same area today (excluding the separate Vocational-Technical District). The last major reorganization, carried out under the Educational Advancement Act, as described in the last opinion, 393 F. Supp. at 438 *passim*, included the consolidation of several small districts into the presently existing districts.¹⁴ This Court ruled that the exclusion of Wilmington from the process of reorganization by statute was an unconstitutional racial classification, and " 'contributed to the separation of races by . . . redrawing district lines.' "¹⁵

The variety of plans submitted as remedies may be grouped for analytical convenience into three broad categories. Certain of the plans submitted are "voluntary plans" of varying scope. These include so-called free transfer provisions, and magnet schools. A second category of plans calls for the reorganization of the districts in the area, dividing the black population among the new districts or attendance area and having new school boards make assignments of the students within the area. These plans range from one proposed by the State Board which would divide the area into five new districts; several variations which would include smaller or greater areas; and a county-wide plan designed to consolidate the whole area into one district. The last category is a set of mandatory assignment plans providing for the transfer and transportation of students among the existing districts. The plans vary in the area to be included, in the transportation, and in the amount of time students would actually spend in desegregated experiences.

The Court has considered all these plans as well as the testimony adduced at the hearings, in the light of the requirements of

13. See State's Exhibit 8 (1959 hearings).

14. See PX 23-0 (liability phase), where the frontpiece describes the changes as *inter alia*, the Middletown and Odessa Districts being combined to form Appoquinimink; H. C. Conrad, Oak Grove, Richardson Park and Newport being combined to form the Conrad Area District; Arden and Mount Pleasant being combined to form the present Mount Pleasant District; and Stanton and Dickinson being combined to form the present Stanton District.

15. See 393 F. Supp. at 431-43, 446, quoting *Milliken*.

*Milliken*¹⁶ and *Swann*,¹⁷ and on that basis has determined the remedy to be followed here.

II. Class Representation.

The State Board of Education urges that the present class plaintiffs are not properly before the Court. The motion was brought on two grounds: first, that the named representatives of the class had left or been graduated from the Wilmington School System, and therefore the issues were mooted as to them;¹⁸ second, that in any event, at least insofar as remedy was concerned, the named plaintiffs and their counsel did not fully, fairly and adequately represent the interests of the class, since (it was alleged) not all black school children and their parents in Wilmington desired particular forms of remedy favored by the representatives.¹⁹

16. 418 U. S. 717, 744-46 (1974).

17. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971) ("Swann").

18. See *Indianapolis Board of School Comm'rs. v. Jacobs*, 420 U. S. 128 (1975); *DeFunis v. Odegaard*, 416 U. S. 312 (1974). But see *Sosna v. Iowa*, 419 U. S. 393 (1975); *Franks v. Bowman Transp. Co.*, U. S., 44 U. S. L. W. 4356, 4357-58 (U. S. March 24, 1976).

We consider that the "named representatives" are those members of the purported class who continue to have standing by reason of the present enrollment of their children in the public schools, see note 19, *infra*.

19. Prior to this phase of the case, the action had been treated by all concerned as a proper class action. See, e.g., 379 F. Supp. at 1219; 393 F. Supp. at 446. The only issue we need determine is whether the named plaintiffs continue fairly and adequately to represent the interests of the class.

There has not been a prior determination that the action could proceed as a class action, as required by Rule 23(c), since the action was commenced before the amendments to the Rule in 1966; that is, at a time when no such requirement was present. See, 3B Moore's Federal Practice, ¶¶ 23.02-1, 23.50. The present phase arises under the continuing jurisdiction of the Court over the case, 379 F. Supp. at 1220; and no separate certification was sought or made.

(Continued on next page)

Professor Moore lists four categories which the Court must consider before determining that the proposed representation is adequate: (1) that the interests be "coextensive"; (2) that the interests not be "antagonistic"; (3) the proportion of the named representatives to the class as a whole; and (4) any facts bearing upon the ability of the named representative to speak for the class as a whole.²⁰ In addition to those factors, the Court notes that the present action must continue in any event, since the Wilmington School Board intervened as a party plaintiff and has full right to pursue the action.²¹ Moreover, even if the named representatives were to be found to be "unrepresentative" of all Wilmington school children, they might well represent a substantial sub-class of the group. *See* Rule 23(c)(4).

Here it would appear that the interests are "coextensive", since all the potential plaintiffs have made clear that they desire an end to segregatory actions on the part of the State. The point pressed by the State is that because some Wilmington parents of black children do not support the plan favored by the named plaintiffs, "antagonistic" interests are present, and therefore, the class is

(Continued from preceding page)

We note that this action does not raise all the questions possible under Rule 23. The potential class of all or a substantial portion of the school children of Wilmington meets the requirements of numerosity, common questions of law and fact, typical claims and defenses; and it is clear that the State Board has acted or refused to act on grounds generally applicable to the entire class, and there exists the danger of inconsistent adjudications or single actions being dispositive of rights. *See* Fed. R. Civ. Proc. Rule 23(a), (b)(1) and (2). Nor has there been any serious dispute of those facts.

The named plaintiffs have established by affidavit that some of their children remain in the system, and the State Board has not pressed the point of mootness. It is clear to us that the jurisdictional requirement of case or controversy which is inherent in the mootness issue has been satisfied. It cannot be questioned that there exists sufficient adversity between the parties to meet the requirements of a concrete sharpening of issues. *See* *Franks v. Bowman Transp. Co.*, *supra*, U. S., 44 U. S. L. W. 4356, at 4358.

20. 3B Moore's Federal Practice, ¶ 23.07[1] at 23-352-53.

21. *Cf.*, *Sosna v. Iowa*, *supra*, 419 U. S. at 399.

improperly represented. First, it is not clear that in these circumstances, the exact nature of the remedy proposed is an interest which cuts to the subject matter of the suit. *See generally*, 3B Moore's Federal Practice ¶ 23.07[3] at 23-404. All potential representatives of plaintiffs who have appeared before the Court have agreed that some remedy is required, and all seek relatively broad remedies.²²

The remedy ordered by this Court must of necessity apply to all black children within the City. Since any remedy ordered in favor of the purported sub-group represented by the named plaintiffs would be determinative of the rights of all, the question is really not the antagonism of interests, but whether the Court has had a full and fair presentation of all possible views on the matter. We, therefore, hold that the named representatives are at the very least part of a class whose rights have been violated. Through the presentations of all parties to this suit, and that of all amici, the Court has been thoroughly informed on the differing views on remedy. The action may therefore continue as a class action, and the class will continue to be that class whose rights were violated, the school children of Wilmington. Should it, anytime in the future, appear that antagonistic interests would prevent fair adjudication, the Court may take the necessary steps of requiring the addition of new parties to fill any representation "gaps". *See* Rule 23(d) Fed. R. Civ. Proc.

III. *The Legal Standard of Milliken and Swann.*

Brown v. Board of Education, 347 U. S. 483 (1954), was a major step in American Constitutional Law, and it is from that case primarily, and its progeny *Green v. New Kent County Board of Education*, 391 U. S. 430 (1968), and *Keyes v. Denver*

22. The "Committee for the Improvement of Education", a group to which the State Board points as epitomizing the antagonism of interests, submitted a document in the nature of an amicus brief, which urges, *inter alia*, a consolidation of districts, and the creation of mandatory minority housing programs in the suburbs. *See* Docket Item No. 430 at A-2, A-3.

School District No. 1, 413 U. S. 189 (1973), that the determination of the existence of a violation of the rights of children in segregated schools is made. That determination has been made in this case, in opinions that date from 1956 to 1975.²³ *Milliken* and *Swann* deal not with the existence of a violation, but with the standards which a court must follow in remedying the violation which it has found. They are expressions not of constitutional law, but of the proper scope of equitable discretion.²⁴

Moreover, *Milliken* and *Swann* must not be read in isolation. As the Court in *Milliken* noted, harking back to both *Swann* and *Brown II*,²⁵ the flexibility and pragmatic judgment of the chancellor of equity have been the consistent pattern of determining remedy in desegregation cases. *Milliken* and *Swann* are not, therefore, substantial departures from prior case law, nor steps backward in the development of remedies for desegregation. Rather, they establish the limits of the equitable discretion to be exercised by the court.²⁶

Thus, *Milliken* makes plain that the remedy to be ordered must be commensurate with the scope of the violation which has been found.²⁷ And insofar as the remedy to be applied is the desegregation of schools, the violation which was found must be proximately related to the operation of the school system, or to its enrollment.²⁸ Further, if it is shown that the substantial disparity in enrollment patterns between districts was substantially

23. See note 7, *supra*.

24. See *Hills v. Gautreaux*, U. S., 44 U. S. L. W. 4480, at 4483 (U. S. April 20, 1976); *Milliken*, 418 U. S. at 737-38 (plurality opinion) and 753 (Stewart, J. concurring); and *Swann*, 402 U. S. at 15.

25. *Brown v. Board of Education*, 349 U. S. 294 (1955).

26. See *Gautreaux*, 44 U. S. L. W. at 4483.

27. 418 U. S. at 744-45; and see, *Gautreaux*, 44 U. S. L. W. at 4483.

28. 418 U. S. at 744-46 (plurality opinion); 418 U. S. at 755-56 (Stewart, J. concurring).

caused by governmental activity, an inter-district remedy may be considered.²⁹

The mere fact that an inter-district violation occurred does not necessarily require an inter-district remedy. It is too longstanding a rule of equity to require citation that although equity will give complete relief, it will limit the exercise of its power to a remedy which is reasonably necessary and likely to succeed. Moreover, an inter-district violation having only de minimis effects will not require school desegregation across the district lines. See 418 U. S. at 750.

We need not catalogue the set of violations with regard to housing and zoning set forth in the last opinion affirmed by the Supreme Court.³⁰ Nor need we rehearse the reasons why we held the Educational Advancement Act to be an unconstitutional "redrawing of district lines."³¹ It suffices to say that the acts described in the prior opinions were the acts of the State and its subdivisions, and had a substantial, not a de minimis, effect on the enrollment patterns of the separate districts.³²

The suburban districts have attempted to foreclose the application of an inter-district remedy including them by citing the prior finding of this Court that each of them was at present operating a unitary system, and urging that they had committed no constitutional violation.³³ Such a defense is inadequate where, as here, the local boards are creatures of the State, and it was the State Legislature and the State Board of Education

29. "Specifically, it must be shown that racially discriminatory acts of the state . . . have been a substantial cause of interdistrict segregation." 418 U. S. at 745.

And see, "The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist." 418 U. S. at 756, n. 2 (Stewart, J. concurring).

30. 393 F. Supp. at 433-38, *aff'd.*, *per curiam*, U. S., 44 U. S. L. W. 3299 (U. S. November 17, 1975).

31. *Idem.* at 439-46.

32. See note 29, *supra*.

33. *Cf.*, *Gautreaux*, *supra*, 44 U. S. L. W. at 4483.

which acted in a fashion which is a substantial and proximate cause of the existing disparity in racial enrollments in the districts of Northern New Castle County. The fact that birth rates, or population shifts, or other factors³⁴ also contributed to a degree will not relieve the State from its obligation to desegregate.³⁵ The remedy for the violation must include school districts which are its instrumentalities and which were the product of one of the violations. The remedy for the acts of the State may be inconvenient, burdensome, and expensive to some of those instrumentalities. But neither inconvenience, burden nor expense can negate the duty of the Court to order effective relief when a not insubstantial violation has been shown.³⁶

The suburban districts have urged that under the standard laid down by the plurality opinion in *Milliken*, no inter-district remedy can be ordered to include them, unless they themselves have been guilty of a violation.³⁷ The suburban districts emphasize that it was not their actions which had any segregatory effect in Wilmington, and that we did not in the last opinion hold that the Educational Advancement Act was drawn with an actual segregatory intent. *See, Milliken, supra*, 418 U. S. at 745.³⁸ That claim, however, must fail, because it misread both the language of *Milliken* and the prior holding of this Court. First, the Chief Justice's opinion in *Milliken* made clear that action by the State which caused inter-district segregation would be sufficient to allow an inter-district remedy.³⁹ The further spe-

34. *See Milliken*, 418 U. S. at 756, n. 2 (Stewart, J. concurring).

35. *Id.*

36. *Milliken*, 418 U. S. at 744-45; *Swann*, 402 U. S. at 28.

37. *See Gautreaux*, 44 U. S. L. W. at 4483-84.

38. "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race."

39. *Id.*

cification of the deliberate drawing of lines to achieve segregation was by way of example, not limitation. As the Supreme Court made clear in *Wright v. Council of Emporia*, it is not the purpose for which the lines are drawn that is determinative of whether they work an impermissible classification, but whether the effect is such that they do. *See*, 407 U. S. 451, at 461-62 (1972). The concurring opinion of Mr. Justice Stewart in *Milliken*, necessary for the majority holding, makes it even clearer that an inter-district remedy may follow wherever it was shown that "state officials had contributed to the separation of the races by drawing or redrawing school district lines." 418 U. S. at 755. The activities found in the prior opinion clearly met that standard, and those findings have been affirmed.⁴⁰ Nor is the liability of the State merely derivative. *See Milliken*, 418 U. S. at 748. Rather, here the State actively contributed to the separation of the races.⁴¹ Nor do we find Mr. Justice Stewart's opinion in *Gautreaux* to be a significant change from his earlier view. Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, and exclusion of the suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.

Moreover, the last opinion also found that although the suburban districts now provided a unitary system for all children within their districts, past activity on their part had not been so confined.⁴² The actions of the suburban districts therefore

40. 393 F. Supp. 428, *aff'd. per curiam*, 44 U. S. L. W. 3299.

41. *Id.*

42. "Unlike the situations in Detroit, where the suburban districts had never been implicated in *de jure* segregation. . . and in Richmond, where suburban districts had participated in *de jure* segregation, but independently from the city school system, . . . *de jure* segregation in New Castle County was a cooperative venture involving both city and suburbs. Although the Wilmington School District was predominately white at that time, a desegregation decree could properly have considered city and suburbs together for

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meet the test laid in *Gautreaux* for inter-district relief, independently of the State's actions.⁴³ For present purposes, it is sufficient to point out, as we found in the last opinion, that despite the separate operation of the systems since the 1950's, the racial characteristics of the city and the suburbs are still inter-related, and the actions of state officials and local officials were sufficient to create an inter-district effect under *Milliken*.⁴⁴

Our duty is to order a remedy which will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred.⁴⁵ Prior opinions of the Supreme Court have held unequivocally that where the violation found resulted in the operation of a dual school system, the Court must order the "greatest possible actual degree of desegregation", consistent with the practicalities of the situ-

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purposes of remedy. At that time, in other words, Wilmington and the suburban districts were not meaningfully 'separate and autonomous'. 393 F. Supp. at 437 (citations omitted).

43. See *Gautreaux*, 44 U. S. L. W. at 4483-85. Justice Stewart's emphasis in *Gautreaux* on the independence of local governmental units, and the requirement that federal courts defer to that independence is an echo of that same concern in *Milliken*. See, *Gautreaux*, 44 U. S. L. W. at 4483. Although the local districts in Delaware have great autonomy, the violations here go directly to that autonomy. Thus, at the time when they carried on segregative acts, the local districts did so in such a way as to make clear that they were not so separate from Wilmington and its operations as now to be free from all culpability for the remaining effects of the segregatory regime which was never completely abolished. 393 F. Supp. at 437-38. The combination of their prior acts negating complete independence; and the State's actions to create boundaries which favored the existing separation of races is sufficient to show that the lines of independent authority are entitled to less weight here than in *Milliken*. See *Gautreaux*, 44 U. S. L. W. at 4484-85. As we note *infra*, pp. 49-50, we respect the autonomous functioning of the school districts, and we will avoid needless interference with those local operations. We establish here only that the remedy which we order may include the suburban districts, because their existence and their actions were part of the violations which lead to the remedy.

44. See, 393 F. Supp. at 438.

45. *Milliken*, 418 U. S. at 746.

ation, *Davis v. Mobile County Bd. of School Comm'rs.*, 402 U. S. 33, 37 (1971); and it must do so by plan which is reasonably certain to achieve desegregation now.⁴⁶ In light of this standard, we must determine whether sufficiently remedial actual desegregation is possible under a plan which would be confined to the boundaries of the present Wilmington district; what level of desegregation will at a minimum establish that a dual system is no longer operating; how wide a geographical area must be included to accomplish properly that result; and by what method and with what safeguards this result can be accomplished. It is to these questions that we turn next.

IV. *Wilmington Only Plan.*

All of the defendants in the instant phase of the case have urged vigorously that the Court has no power to order an inter-district remedy absent further findings of inter-district violation. They have also urged that a plan which involves only the Wilmington schools will be adequate to remedy the violations found in the prior opinions. Since a finding that such a plan was adequate would relieve the Court of the necessity of dealing with many vexing questions, we deal with this issue first.⁴⁷

The Wilmington School District, the boundaries of which are coterminous with the city lines presently serves 13,852 students, of whom 11,733 or 84.7% are black and an additional 746 or 5.4% of whom are Hispanic.⁴⁸ The system as a whole is therefore 90% minority enrollment. Only two schools within the system are presently majority white: Cedar Hill Elemen-

46. *Gautreaux*, 44 U. S. L. W. at 4484; *Green v. Board of Education of New Kent County*, 391 U. S. at 439.

47. In its last opinion, this Court was careful to note that it had not considered what scope any remedy would be required to take. 393 F. Supp. at 446, n. 37.

For that reason, the Court sought the submission of a plan that would be confined to the present Wilmington School District. *Id.*

48. See D. DPI. Rem. 24 at 5.

tary School which is 73.4% white; and Highlands Community School which is 59.6% white.⁴⁹ All of the other schools are not only majority black, but heavily so. As we noted in an earlier opinion, some of those schools which were black schools *de jure* in 1954 have continued to have enrollments over 91% black.⁵⁰

The plan proposed to cluster certain of the elementary schools in an effort to reduce the black enrollment; and to redraw the "feeder" lines for the middle schools, and the attendance boundaries of the two high schools.⁵¹ It was drawn in great part by the Wilmington School Board, although some changes and additions were made by the staff of the State Department of Public Instruction.⁵² As submitted, the plan is necessarily limited in its effect by the population characteristics of the area it would cover.⁵³ Nonetheless, it would result in the schools which were formerly *de jure* minority schools being desegregated to the extent of bringing their enrollments below 90% black for the first time.⁵⁴ Other schools would, however, remain more than 90% minority.⁵⁵ We must, therefore, determine whether such a level

49. *Id.*

50. See 379 F. Supp. at 1223, and n. 8. The present enrollments of schools listed in that footnote continue to be over 95% black, except for the former Howard High School. Elbert Elementary is 97.6% black; Stubbs Elementary is 97.6% black; Drew Elementary is 98.2% black; and Bancroft Middle School is 96.3% black. The Howard High School has been reopened as a vocational-technical school, and is now 85.2% black. The Court notes that the only other vocational-technical school in the area presently open (a third will open next fall) is 93.2% white.

51. See D. DPI. Rem. No. 19.

52. Tr. 1506-07.

53. See p. 21, *supra*; Tr. 1507.

54. Under the proposal, Stubbs would become 86.5% black; Drew would become 75.7% black; Elbert would become 79.8% black; and Bancroft Middle School would become 88.1% black. See D. DPI. Rem. No. 19 at 14, 16 and 22.

55. *E.g.*, Cool Springs Elementary would be 92.9% black; Harlan Elementary would be 93.9% black; Highlands Community

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of minority enrollment in the context of the present case would be sufficient to constitute a remedy for the violations found.

The Supreme Court has made it clear that there is no magic in percentages of minority enrollment. See *Swann*, 402 U. S. at 25-26. *Milliken*, 418 U. S. at 740-41 & n. 19, 747 n. 22; 756 (Stewart J. concurring). Such percentages are merely the starting point in the formulation of a remedy and the determination of whether the remedy is complete. *Swann*, 402 U. S. at 25. Moreover, such figures are meaningless unless seen in the proper context: they must be weighed in light of the characteristics of the community. *Id.*; and see *Wright v. Council of City of Emporia*, 407 U. S. at 464-65 (1974).

If the community whose characteristics would be determinative of the weight to be given to the enrollment figures were seen as Wilmington alone, such a plan might afford the relief which the Constitution requires. The fact that the schools would continue to be heavily black while the suburbs would be white would not alone require an inter-district remedy. *Milliken*, 418 U. S. at 756 (Stewart J. concurring). This Court, however, cannot use such a narrow view of the community, in light of the scope of the prior violations. *Gautreaux*, 44 U. S. L. W. at 4485.

The Supreme Court has made it clear that the determination of the violation is a key factor in determining remedy. *Swann*, 402 U. S. at 16; *Milliken*, 418 U. S. at 744. We have already determined that the State had not fulfilled its mandate to operate a unitary school system;⁵⁶ and that in the past the area com-

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School, containing only the fifth grade of one "cluster" would be 93.5% black, while two of its components for the lower grades (K-4), Gray and North East, would be 92.3% and 90% black respectively. D. DPI. Rem. No. 19 at 13, 14.

The Warner Middle School would be 91.9% black; and the Burnett Middle School would be 92.3% black. *Id.* at 21, 23.

P. S. DuPont High School would be 91.1% black. *Id.* at 27.

56. 379 F. Supp. at 1223.

prising the suburban and city districts was treated jointly for many school purposes, including the transportation of black students to *de jure* segregated schools.⁵⁷ In these circumstances, it is apparent that the entire northern New Castle area must be treated as one community in terms of its population characteristics, because that is the way it was perceived and treated by the State and its citizenry. *Gautreaux*, 44 U. S. L. W. at 4485; *Keyes v. Denver School District No. 1*, 413 U. S. 189 (1973). While other districts in this area were being consolidated or considered for consolidation, the Wilmington District was expressly reserved from the exercise of discretion by the State Board, and that reservation "played a significant part in maintaining the racial identifiability of the Wilmington and suburban New Castle County school districts."⁵⁸ Moreover, state action was also found to be responsible here for the racial identifiability of the suburbs and the city, through enforcement of racial covenants, zoning and encouragement and support of private discrimination in housing.⁵⁹ For these reasons, the effectiveness of any plan must be judged by how well it terminates racial identifiability of the schools in light of the population characteristics of the northern county area. *Gautreaux*, 44 U. S. L. W. at 4485. *Cf.*, *Swann*, at 25.⁶⁰ To hold otherwise in the present context would mean that state officials could, by their actions, effectuate a pattern of discrimination in schools and housing, then argue that the area had become divided into separate communities identified by them, and that only the population characteristics of their selected area need be taken into account.

57. 393 F. Supp. at 433.

58. 393 F. Supp. at 445.

59. 393 F. Supp. at 437-38.

60. "As we said in *Green* [v. New Kent County School Board, 391 U. S. 430], a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."

The school population of Northern New Castle County is presently 78.5% white.⁶¹ A plan limited to the confines of Wilmington would result in city schools that would be, for the most part, 85% to 95% black, while the suburban schools, other than those of DeLaWarr, remained overwhelmingly white.⁶² Thus, a Wilmington-only plan would not significantly affect the present racial identifiability of the Wilmington or suburban schools. It is the duty of the State to bring forward a plan that will achieve desegregation, to the "greatest possible actual degree", *Swann*, 402 U. S. at 26; and here that duty will not have been carried out when the schools will maintain their former racial identity.

We do not here decide that the fact that Wilmington would be a black system surrounded by white systems is sufficient to call for an inter-district remedy. *See Milliken*, 418 U. S. at 735, 747 and n. 22. Nor do we determine that a majority black system is of necessity segregated. *See United States v. Scotland Neck Board of Education*, 407 U. S. 484 (1972). Rather, we hold only that insofar as the Wilmington-only plan is concerned, where inter-district violations have been found, it is appropriate to look at the population of the area over which the violations occurred to determine in the first instance whether the plan submitted results in actual desegregation. *See Gautreaux*, 44 U. S. L. W. at 4485. Where the plan would result in the maintenance of the traditional racial identity previously established by State action, and that disparity in racial enrollments remains substantial, it cannot be said that it results in the disestablishment of a dual system. *See United States v. Scotland Neck Board of Education*, 407 U. S. 484, 490. We, therefore, hold that under the proof developed before us, a Wilmington-only plan would not remedy the violations previously found, and that we must go on to consider an inter-district remedy.

61. *See* p. 6, *supra*.

62. *See*, pp. 6, 23, *supra*.

V. Proposed Inter-District Remedies.

The Court has had before it several different types of plans for remedying the violations found, some of which have been recommended in varying degrees by the parties, and others of which were proposed by various individuals and submitted through the State Board. We will not take the time to list seriatim all the various proposals, which are part of the record, but it is appropriate to note that not one of the plans submitted has been found to be completely acceptable taking into consideration all the practicalities of the situation. *Davis v. Mobile County Bd. of School Comm'rs.*, 402 U. S. 33, 37 (1971). We make the following findings with regard to the various types of inter-district plans.

A. Voluntary Plans.

The category of voluntary plans includes several different proposals. A proposal on which much evidence was adduced calls for the creation by the suburban districts and Wilmington of so-called "magnet schools" to serve five "zones" which would be drawn up by combining a portion of Wilmington with one or more suburban districts.⁶³ The racial make-up of the school population of each zone would approximate the racial characteristics of the county as a whole.⁶⁴ All of the presently existing school districts would be retained, and, in addition, each "zone" would have an "Advisory Committee" which would be responsible for implementation of magnet proposals. The actual operation of individual magnet programs in schools would be the

63. This is the so-called "Zone Transfer Plan", see D. DPI. Rem. No. 8. In each instance, except one, a part of Wilmington would be joined to two or more suburban districts. In one instance, the zone would include only one suburban district.

64. The lines were drawn so as to equalize substantially racial enrollments, tax assessments and populations, while maintaining geographical contiguity and the identity of existing suburban districts. See Tr. at 213-17.

responsibility of the district in which the building was physically located. D. DPI. Rem. No. 8 at 5-6.⁶⁵

The central concept in all of these voluntary proposals is that some schools are or can be made so attractive that students will enroll in those schools for the particular program rather than in the neighborhood school to which they would ordinarily have been assigned. The magnet schools proposed are characteristic of the concept: every school in every district would eventually house some sort of magnet program thought by the residents to be both educationally desirable and desegregatory in its attraction.⁶⁶ As originally advanced, no binding racial quotas were to be included, although the State Board agreed at trial that they might be used in addition to the program designs. Educators who testified in favor of the plan all agreed that they hoped the plan would work but that there was no way that success could be guaranteed. They sought instead, time to try the plan.⁶⁷

In determining whether any voluntary plan developed in the testimony meets the requirements of a desegregation plan, the Court has had to consider the goals which *any* plan ordered by the Court would be required to meet; and then determine whether

65. Other familiar types of voluntary programs were proposed initially by various interested persons or groups, but were not carried forward by the State Board before the Court. These included majority-to-minority transfer programs; and the amendment of state law to allow transfers among districts. 14 Del. C. § 603 presently provides for payment of "tuition" when a child who is a resident of one district attends school in another district. Subsection (c) allows a student who is a student who is a resident of Wilmington, Alexis I. DuPont, Mount Pleasant, or Alfred I. DuPont to attend school in ny of those districts, provided that the board of the "receiving" district approves the application for transfer. The proposed amendment would be designed to restrict the approval power to reasons of space or reasonable disciplinary requirements, to prevent exclusion on racial grounds, and to extend the number of districts involved.

66. See Tr. 233-40. That is, each of the schools would be not only educationally sound, but also be seen by sufficient numbers of white and black parents and students as desirable enough to cause the voluntary enrollment of the school to be desegregated.

67. See, e.g., Tr. 554, 682-83.

the plan proposed offers adequate assurance that the goals would be met. The Supreme Court has made clear that time is a commodity whose place has become restricted in desegregation cases. "The time for mere 'deliberate speed' has run out. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.'" ⁶⁸ Moreover, the plan must not offer merely a hope of some desegregation at some time in the future. "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one race schools." ⁶⁹

The magnet plans proposed here simply do not measure up to those requirements. We do not hold that magnet plans are incapable of achieving reasonable levels of desegregation. In a different context, with different safeguards, such a plan might be sufficient. See *Hart v. Community School Board*, 512 F. 2d 37 (2d Cir. 1975). However, in other contexts, magnet plans similar to the one here have been disapproved. See, *Brinkman v. Gilligan*, 503 F. 2d 684, 704 (6th Cir. 1974); *Spangler v. Pasadena Board of Education*, 375 F. Supp. 1304, 1307 (C. D. Cal. 1974), *aff'd*, 519 F. 2d 430, 438-39 (9th Cir. 1975), *cert. granted*, _____ U. S. _____, 44 U. S. L. W. 3279 (U. S. November 11, 1975). The magnet system called to the attention of the Court by the State Board, that beginning operation in Houston, shows relatively little success in actually desegregating schools: it has in fact resulted in some schools receiving an even greater minority enrollment. ⁷⁰ The suburban districts which brought forward "expansions" of the outline made by the State were unable to assure the Court that it would actually result in significant desegregation. ⁷¹ Moreover, the State Board failed to cost out its

68. *Green v. New Kent County School Board*, 391 U. S. 430, 438-39 (1968) (emphasis in the original) (citations omitted).

69. *Swann. supra*, 402 U. S. at 26.

70. See D. DPI. Rem. Nos. 12, 13, 14. Tr. 585-90, 616-17.

71. See, e.g., Tr. 792-97, 682.

proposal adequately. ⁷² In light of the cost of operating programs in other cities, the cost figures given to the Court in the "expansions" seem unreliable indeed. ⁷³

The magnet program is heavily dependent upon the unique drawing power of particular programs and faculty to attract and hold students. There is necessarily a limited market for special programs. ⁷⁴ While magnets might be used to desegregate individual schools otherwise not part of a segregated system, their use as the sole means of system-wide desegregation is decidedly unpromising. See *Bradley v. Milliken*, 402 F. Supp. 1096, 1147 (E. D. Mich. 1975). Absent a showing that significant desegregation *must* occur *in fact* as a part of the operation of magnet schools, the Court cannot accept the plan. No such showing has been made.

The other voluntary plans proposed to the Court suffer from similar defects. As *Green, supra*, made clear, voluntary programs are unacceptable where there are "reasonably available other ways . . . promising speedier and more effective conversion to a unitary, nonracial school system. . . ." ⁷⁵ None of the other voluntary plans proposed promises realistically to work effectively now, and those plans lack even the modicum of attraction inherent in the magnet system. Thus, assuming that a voluntary program could be developed in an effort to meet reasonable desegregation goals, the proposals presented to this Court are not adequate to assure meeting that goal, and are therefore inadequate as remedies.

72. See Tr. 302-04, 392, 400, 437-38.

73. For example, to operate forty-six magnet programs in Houston will cost approximately \$9.3 million. The present 34 programs are funded at \$5 million. D. DPI. Rem. No. 12 at 195; Tr. 527-28.

The proposed programs here are funded at well below that level. See, D. Mt. Pl. Rem. No. 1 at 104 and D. Mt. Pl. Rem. No. 1A at 3; D. Alf. I. Rem. No. 1 at A-7; D. Stanton Rem. No. 1 at 39, and D. Alexis I. Rem. No. 1 at 24, 25.

74. See, e.g., Tr. at 95.

75. *Green v. New Kent County School Board*, 391 U. S. at 441.

B. Cluster and Center Plans.

The Wilmington School Board, as Intervening Plaintiff, submitted a major proposal ["the Wilmington Metro Plan"] which would require the transportation of a sufficient number of students across the district lines to desegregate some of the area schools. *See*, Int. P. Rem. No. 1, 8. The enrollments would be determined by "clustering" particular city schools with given suburban schools, so that each school within the cluster would have approximately the same racial characteristics. In order to accommodate all the children involved and to spread the burden among suburban and city children, grade patterns would be altered so that schools would serve part of a given elementary or high school level.⁷⁶

The Wilmington Metro Plan proposes that all of the existing districts be retained, at least initially, to insure the fair treatment of the students being transferred, and to assist in the organizational transition from a dual to a unitary system.

The State Board and the suburban districts are very strongly opposed to the cluster plan, denominating it "forced busing" which they call a "bankrupt concept". The Wilmington School Board takes the position that it is the only plan which actually insures the re-assignment of students to desegregated schools, and is therefore the only plan presented to the Court which meets the requirements of *Green*.⁷⁷

The only other plan submitted to the Court which effectively reassigns students is the so-called "Center Plan" submitted by the Alfred I. DuPont School District.⁷⁸ The Center Plan involves the

76. Thus, for example, a city school presently serving grades K-6, would be clustered with two or more suburban schools serving the same grade levels. Under the plan, the city school might then house all the K-2 students presently enrolled in all three schools, and the suburban schools would divide the remaining grades and students between them.

77. *See*, pp. 30-31, *supra*.

78. *See* D. Alfred I. Rem. No. 2.

part-time re-assignment of elementary children, so that those in grades one through six would attend neighborhood schools for all of their academic subjects, and for one day per week would meet in desegregated "Centers" for training in *e.g.*, physical education, music and art. Children in the seventh through the twelfth grades would be mandatorily assigned full time to desegregated schools, all seventh graders in the area being taught in the present city schools, and all eighth through twelfth grades being taught in present suburban schools.⁷⁹

Where desegregation is to take place in one school district, the use of clusters and pairings, as well as other sorts of re-assignment and transportation schemes offer the best guarantee that actual desegregation will take place. The Supreme Court has made it clear that such plans are a proper part of an overall remedy. *See*, *Swann* at 29-30.⁸⁰ But the Court has also made it clear that all of the circumstances of a particular locality are to be taken into account when the District Court makes its determination of what plan to order.⁸¹

The cluster and center plans both include inter-district assignments. We must agree with the Supreme Court that an inter-district transportation plan standing alone is difficult to administer, and fraught with complex problems unsuited for judicial determination.⁸² In particular, we note that in Delaware

79. *See, id. and Tr.* 2775-85.

80. "The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case. . . . The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record. . . .

. . . In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to walk-in schools." 402 U. S. at 29-30.

81. *See Swann*, 402 U. S. at 28-32.

82. *Milliken*, 418 U. S. at 742-44, catalogues some of the major problems.

local districts have had a long history of control over curriculum and text choice,⁸³ as well as the common governmental functions of setting and levying taxes, and maintaining communication and accountability between administrators and parents.⁸⁴ The transportation schemes would endanger all of these functions, or make their performance much more difficult. The mere fact of extra administrative burden is not, of course, sufficient to make a plan so impractical or burdensome as to be beyond the equity power of the Court.⁸⁵ Nonetheless, where methods are available which will accomplish the result without the associated problems, the Court, as a matter of equitable discretion, should follow that course which will require its intervention in the least possible degree which will insure compliance. *See generally, Milliken*, 418 U. S. 740-45; *Gautreaux*, 44 U. S. L. W. 4483-85.

The Wilmington Metro Plan, though containing many admirable features and safeguards with regard to minority rights, would place the Court in the ongoing position of general supervisor of education in New Castle County. In the event of disagreements over curriculum patterns or textbooks, the Court or a master would have to step in. Moreover, the relationship of parents to the school their child attends, and the interests which they take in the operation and policies of that school can be an important determinant of the success of the child in education.⁸⁶ Except in the Wilmington and Alexis I. DuPont Districts, school board members are elected. *See* 14 Del. C. §§ 1051, 1062, 1063. The Wilmington Metro Plan would make it much more difficult for individual parents to require accountability from teachers and administrators who are employed by districts other than that of their voting residence. In light of all the circumstances here, the Court cannot in the exercise of equity order the cluster plan as proposed. Transportation schemes, as

83. 14 Del. C. § 1049.

84. 14 Del. C. §§ 1902-23, 1058.

85. *Swann*, 402 U. S. at 28.

86. *See*, Tr. 2836, 2861.

well as the redrawing of attendance lines and other shifts in present patterns of attendance, will undoubtedly be required to desegregate. But such plans are better drawn where the greatest possible degree of control is in the hands of local leaders acting in accordance with constitutional limitations.

The Center Plan suffers from the same defects, at least insofar as it would assign students from one district to schools under the supervision of a district over which their parents have little control or political voice.⁸⁷ Moreover, the Center Plan, whatever the purpose of the originators, would place an inequitable burden on the present staff of the Wilmington schools, requiring, for example, that present high school teachers switch to seventh grade, or scramble for the positions which might open up in their field in the suburban districts.⁸⁸ In addition, while accomplishing the desegregation of the secondary level schools, the mere part-time desegregation for the elementary grades⁸⁹ is inadequate as a final result of a desegregation plan under the standard established by *Green and Swann*.⁹⁰ *Keyes v. Denver School District No. 1*, 521 F. 2d 465, 477-79 (10th Cir. 1975).

No cluster or center plan which has been proposed would meet the test of administrative feasibility which is, in our view, an absolute prerequisite to the long-range success of any remedy.

C. Reorganization Plans.

The reorganization plans submitted by various parties propose correcting the prior violations by redrawing the boundary lines found to have been drawn improperly. That is, they attempt to combine Wilmington and various of the suburban districts into new consolidated districts. It is expected that the populations of these districts will reflect the racial character of the area as

87. *See* Tr. at 2775-76.

88. *See* Tr. at 2810-12.

89. Tr. at 2803-04, 2805-06, 2808.

90. *See* pp. 30-31, *supra*.

a whole,⁹¹ and that following the effectuation of the remedy, the new districts could assign pupils within their localities on a desegregated basis and otherwise operate a unitary system. The differences among the reorganization plans proposed pose two issues: (1) whether the area should be split into several new districts or consolidated into one large district; and (2) the extent of the geographical area to be included in the reorganization.

The State Board and the suburban districts have introduced a reorganization plan in which the Wilmington District is split into five parts. Five new districts are established, each consisting of one or more suburban districts and one-fifth of Wilmington.⁹² Two of the suburban districts have sought to include in the five district reorganization plan the Newark District.⁹³ Other than changing the pupil and geographical ranges, the inclusion or exclusion of Newark would not affect the operation of the plan. We will, therefore, discuss the plan in light of its other characteristics, since we deal *infra* with the extent of geographical area to be required.⁹⁴

After reorganization, the operation of the proposed five districts would be as present Delaware law requires. New elections for board members would eventually have to be held, but in virtually all respects, the proposal follows the reorganization scheme approved by the State Legislature and described in the

91. See Tr. 213. They were also drawn to allow equalization of tax bases, sufficient space in existing facilities for the projected enrollments, etc. *Id.* 213-17.

92. See D. DPI. Rem. No. 18.

93. See D. Mt. Pl. Rem. No. 9. The "laboring oar" of this dispute was borne by the attorneys for Mount Pleasant, Conrad and Newark. Mount Pleasant and Conrad sought to include Newark in order to prevent it from becoming or remaining a white haven in an otherwise desegregated area, and to spread the associated tax burden. Newark sought to narrow the area, at least to its exclusion. The DeLaWarr District, favoring a county-wide plan, also provided some evidence on the inclusion of Newark.

94. See Part VI A, p. 53, *infra*.

last opinion.⁹⁵ The only departures from the existing state scheme set forth in 14 Del. C. §§ 1001, *et seq.*, would be that in contravention of provisions of the Act, Wilmington would be split; enrollments in certain of the reorganized districts would exceed 12,000;⁹⁶ and the salaries of teachers and staff in the reorganized district would not be "leveled up".⁹⁷ The only change required by the inclusion of Newark would be that one or more districts other than Wilmington would be split.⁹⁸

The other major proposal⁹⁹ for reorganization was that submitted by the DeLaWarr District, which would require that the whole of New Castle County be included in one school district which would be further divided into four or more attendance areas.¹⁰⁰ The area or district would be supervised by an elected board, and each of the attendance areas would have elected or appointed advisory groups which would maintain

95. See 393 F. Supp. at 438, *et seq.*

96. 14 Del. C. § 1004(c)(2), (3) required that only "whole districts" which were contiguous could be joined, and then only if the resulting enrollment of the reorganized district was no greater than 12,000 pupils. According to D. DPI. Rem. No. 18, three of the five reorganized districts proposed would have enrollments in excess of 12,000. See D. DPI. Rem. No. 18 at 5.

97. Under the Educational Advancement Act, the salaries of all employees in a reorganized district were set at the level of the highest salary for that position among the former component districts. 14 Del. C. § 1009. This insured that all staff personnel in the new district with equal service and skills would be receiving equal pay.

Such leveling up would be quite expensive, however, at a time when bond issues and tax increases have not met with a favored response by the electorate. For that reason, the State chose not to recommend leveling up as part of its plan. See Tr. 1558-61.

98. See D. Mt. Pl. Rem. Nos. 7, 9.

99. The Wilmington Board agreed through certain of its witnesses that a reorganization of the desegregation area would eventually prove necessary. See Tr. 2361, 2370. The feeling of the Wilmington Board, not unlike that of this Court, was that the State Legislature or its delegates should be the appropriate agency to make the determinations of district lines, etc. Since no details of a "Wilmington redistricting proposal" were submitted or otherwise put before the Court, we do not comment further upon it.

100. See D. DeLaWarr Rem. Nos. 2, 3.

contact with the citizenry. It is the position of DeLaWarr that by including the entire county, several educational benefits would be achieved as well as desegregation of the schools. The tax assessments and collections across the county would be equalized for all the schools, and the population of the entire county would necessarily be reflected in the population of the school district and the schools. If the population were to shift in ways not now foreseen, the county-wide district could shift attendance zones to ensure the continued operation of a unitary system over the whole county.¹⁰¹

The suburban districts other than DeLaWarr do not favor a reorganization, but would prefer it to transportation plans implemented without such shift in control. All of the parties, except DeLaWarr, have generally opposed the county-wide plan as creating a major shift in the way Delaware has historically operated its schools.¹⁰² DeLaWarr's preference for its plan is at least partially based on its own unique position. Among the districts in New Castle County, DeLaWarr is relatively poor since not only is its population of a substantially lower income level, but a major part of the district's tax base is exempt from taxation because of public uses of the property, including the approaches to the Delaware Memorial Bridges, etc. The change to a county-wide system would enable DeLaWarr to benefit from the better tax assessment and property ratios of the other suburban districts.

The power of the Court to order a reorganization would not appear to be in doubt. Justice Stewart's concurring opinion in *Milliken* makes explicit reference to a decree calling for the restructuring of districts as an appropriate remedy for certain kinds of violations. See 418 U. S. at 755; and see *Gautreaux*, 44 U. S. L. W. 4484 and n. 12. The Supreme Court has made clear in other contexts that the courts have the power to prevent a

101. See D. DeLaWarr Rem. No. 2 at 7-10; cf., e.g., Tr. at 1045 A, 1045 B.

102. See, e.g., Tr. at 451-52.

reorganization or creation of new districts when to allow the shift would recreate dual systems. See *Wright v. Council of City of Emporia*, 407 U. S. 451 (1972); *United States v. Scotland Neck Board of Education*, 407 U. S. 484 (1972). Moreover, as noted by the state defendants, reorganization may well be peculiarly suited as the remedy in the instant case, where one of the violations which was found was the prior improper reorganization of districts including some of those now before the Court.¹⁰³ The standard formulated by the Court is that the remedial decree should be directed toward placing the victims of the violation in the position they would have occupied had the violation not occurred.¹⁰⁴ Where one of the violations was the isolation of Wilmington from the possibility of union with other districts, *prima facie* an appropriate remedy would be ordering of the union to take place.

We have determined that the violations found in the instant case present a situation where some sort of consolidation or reorganization is required. There is ample testimony that without reorganization of some kind, no plan will be able to function in an administratively feasible manner.¹⁰⁵ We will, therefore, require the implementation of a reorganization plan. Nonetheless, for the reasons which follow, the Court cannot order any of the reorganization plans as proposed.

The Supreme Court in *Milliken* mentioned some of the major problems in consolidating districts, including assessing taxes and setting of election periods. Those decisions are difficult, but in the main, standards exist either in state statutory materials or court decisions which could be used by the equity court to determine some of these issues, and whether proper discretion had been exercised by the state and local officials. The decisions we are asked to make here are much more difficult, and much more open to question with little guidance from state law or

103. See pp. 7-8, *supra*.

104. *Milliken*, 418 U. S. at 746.

105. See, e.g., Tr. at 2948.

federal constitutional guarantees. The State Board and the suburban districts would have us determine, *e.g.*, where present districts should be cut, and what weight should be given to equalizing tax assessments, or populations. Although the State Board has presented a plan, during testimony it admitted that, in light of more recent figures, it would probably recommend somewhat different lines be drawn.¹⁰⁶ In view of the major differences in opinion with regard to the inclusion or exclusion of Newark, the issues of transportation time and population levels of appropriately sized districts ought to be dealt with explicitly by State education officials. Had the State Board's plan or any other plan been drawn with reference to specific criteria formulated after consideration of the task to be accomplished, and was therefore a reasonable method of accomplishing the goal by persons given such power in the state system, the Court could then view the matter as requiring only a determination of whether discretion was properly exercised in drawing the lines, etc. Absent such criteria, we feel that the more proper course is to create a situation which will not freeze the district lines by court order, but will create a framework within which the State can make a future determination of proper districts for the area, while insuring that actual desegregation will take place.

The State Board has claimed that its plan for reorganization does nothing but follow the method approved by the State Legislature in the Educational Advancement Act, and that therefore some weight should be given to it. First, as we noted above, the proposal varies from the statute in certain respects, and we cannot now determine by hindsight what weight was attached to those portions of the statute with which the proposal differs. The State Board's proposal splits at least one district, despite the bond problems which might be caused thereby. We do not know and cannot now guess how the State Legis-

106. See Tr. at 1603-04.

lature would have desired to handle such a problem.¹⁰⁷ The State Board treats rather lightly the size limitation of reorganized districts imposed by the Legislature. It may well be that size is no longer the problem it was once thought to be,¹⁰⁸ but we have no evidence upon which we can say with finality that the State Legislature would treat it as such.

Similarly, to impose a county-wide system although it would offer significant advantages not only to DeLaWarr but also to the Court, would be to order a major shift in Delaware school policy. If such a shift were necessary to remedy a constitutional violation, it would be permissible, but as we find in our treatment of geographic area, *infra*, p. 53, no such showing has been made here.

Nonetheless, as we noted *supra*, some reorganization is required. The Court must at a minimum determine the districts which will be included in such a reorganization, and make provisions for the governance of the area in the event that the State officials fail to act. We note that our opinion in this regard is not a final determination of the organization of the area and of the lines to be followed in setting up such an area,

107. But see also, 14 Del. C. § 1028, which deals with the division of an existing district into two or more separate districts, and the resulting treatment of the indebtedness of the former district. Under that section, the indebtedness of the component district remained the obligation of the residents of the area of the former district, to be collected through taxation by the new districts whose boundaries included the former district lines. 14 Del. C. § 1028(d)(e).

We note, however, that the problem of bonded indebtedness becomes much different when a district is not simply divided, but divided and merged into still another district. This would require maintaining the identity for tax purposes of the former district's area, so that the residents of that area might be taxed for purposes unrelated to their present district, and to thus create several different tax structures within a new district dependent upon whether one lives in the former district area split off or the whole joint district, which would be not only administratively burdensome, but would also require some modifications in the present tax structure of the New Castle County districts.

108. Cf., 393 F. Supp. at 444-45.

as would be the case if we were to order one of the reorganization plans proposed to us. Rather, the reorganization outlined *infra* is effective only in absence of proper state action to change it. Of course, if the state or local officials were to act in such a manner as to defeat or block desegregation under the guise of a shift in the reorganization plan, the Court would be forced to review the State's action in light of the requirements set out in *Wright v. Council of City of Emporia*, 407 U. S. 451 (1972); and *United States v. Scotland Neck Board of Education*, 407 U. S. 484 (1972).

In determining how such a reorganization would best be accomplished in light of our limited objectives, we have, whenever possible, attempted to comply with state law. It would seem clear that we are not bound by state law, for this is a matter of a federal remedy for a violation of federal rights. See *Louisiana v. United States*, 380 U. S. 145, 154-56 (1965); *Haney v. Board of Education of Sevier County*, 429 F. 2d 361, 368 (8th Cir. 1970). However, we read *Milliken* as requiring that the equity court in ordering desegregation remedies give proper deference to the traditions and acts of the states in setting up educational units. 418 U. S. at 741-42; and see *Gautreaux*, 44 U. S. L. W. at 4483-84. Such decisions are far better left to legislators and the process of compromise than to the rigors of judicial determination. 418 U. S. at 744. We have, therefore, followed state law in determining the extent of reorganization and the method by which districts will be included, except where those provisions would prevent a remedy from becoming effective. Determinations of methods of governance, and the day-to-day operations of the schools will be left in the hands of appropriate local officials. This Court should have no need to interfere in those decisions, unless they violate federal law or constitutional provisions. In any event, the initial determination will be by those who are by training, expertise and experience qualified to make such judgment. See *Milliken*, 418 U. S. 744.

VI. Remedy.

As we have made clear, reorganization or consolidation of some portion of the existing districts is required, since otherwise an inter-district plan would fail by reason of its administrative burden. While there are undoubtedly problems in the management of large school districts, the problems of curriculum coordination, planning, teacher and staff control and supervision, policy implementation, and coordination of school programs with the needs of the community can be better met by a district with sufficient power to meet the problems which will arise, rather than by having 11 or 12 different districts arrange separate solutions. Moreover, it will allow the parents of children attending the schools to have some voice and control over their child's education by the power to elect school board members.

In reviewing the evidence, it has become plain that the Court must choose between following the provision of state law which confined reorganized districts to enrollments of fewer than 12,000; and that provision which sought to limit reorganization to whole districts. The reasons for the first limitation were several fold, including a desire to maintain small units which would require a lower administrative overhead; and to continue the use of small locally elected school boards.¹⁰⁹ We have already found that there is substantial professional disagreement over whether the 12,000 population figure is necessary to achieve the administrative economies sought,¹¹⁰ and the present testimony has reinforced that view.¹¹¹ Moreover, as we have already noted, even the State Board in its suggestions to us did not find the 12,000 figure a controlling limitation.¹¹²

Local community control is, of course, an important feature of American education, and we are required to give deference to

109. See, 393 F. Supp. at 444.

110. *Id.* at 445.

111. See, e.g., Tr. at 1269-70.

112. See note 96, *supra*.

it unless circumstances dictate otherwise. *Milliken*, 418 U. S. at 741, and see *Gautreaux*, 44 U. S. L. W. at 4484-85. We find that circumstances here indicate that the required change in local control need not be so substantial as to give rise to major problems. The 12,000 pupil limitation would require us to split existing districts, and would for all practical purposes make any reasonable reorganization impossible. The change which we require *infra*, although initially setting up a large district, is not only subject to appropriate subdivision for local control over issues of policy in particular schools, or local initiative with regard to curriculum, *etc.*,¹¹³ but is also subject to redivision into smaller governmental units by action of the State, so long as such subdivision does not result in the frustration of the desegregation objective. Even if the State should decline the opportunity, experience in other states has shown that districts of the size proposed *infra* can be effectively administered.¹¹⁴

The alternative in the instant case would be for the Court to attempt to redistribute the population and tax ratables of the area by drawing new district lines. Although such an operation is theoretically possible, and might be accomplished in reliance on the evidence presented by the State Board and other parties, we are unwilling to impose our view of the most reasonable distribution of tax base and population levels. Even if we were to assume, as the State Board evidently did, that Wilmington should be treated separately as the source of the "problem" and that no other district lines need be shifted,¹¹⁵ we would be

113. See Tr. 1837-38, 1901.

114. We note that some school districts in Florida presently operate with an even larger number of students; in one instance, almost triple that here. (Dade County in 1973-74 had 259,949 pupils). The Court also heard testimony from Charles Wendorf, presently an administrator with the Prince George's County School System in Maryland, see Tr. at 1807, *et seq.*, which serves some 148,000 students. Tr. at 1810-11.

115. See Tr. at 170, 253, 254-55, 260, 265. We do not treat the issue of whether the determination that only Wilmington would be split might be an improper classification. Such a plan was proposed at the time of the 1968 Act. See, e.g., Tr. 2551-52.

required to determine which alternative presented by the parties was the "fairest" way to split that district. For the Court to become involved in such a task in the first instance, would be to raise many of the problems which the Supreme Court in *Milliken* found to be unsuited for judicial determination. 418 U. S. at 743-44. And see *San Antonio School District v. Rodriguez*, 411 U. S. 1, 41 (1973). The problem of splitting the liability on bonds and other outstanding obligations also raises difficult questions of how much of a tax "break" to allow to some of the districts,¹¹⁶ and an examination of the Educational Advancement Act makes clear that the problem is not one previously determined by the State Legislature.¹¹⁷ For these reasons, the proper course for this Court is to consolidate whole districts, subject to the power of the Legislature to redivide the areas in the future, using appropriate lines which are non-racial in their purpose and effect.¹¹⁸

A. Extent of Area.

Having determined that only whole districts are to be included in the plan; that the 12,000 pupil limitation on enrollments does not apply; and that this Court is not the proper agency to subdivide the area into new districts, we turn to the question of which districts must be included in the remedy to be ordered. It is apparent, of course, that this will affect the question of what will constitute a *prima facie* desegregated school, and will affect the administrative and other operational burdens.

This determination is primarily a question of whether two outlying districts, Appoquinimink and Newark are to be included within the scope of the plan. The decision as to Appo-

116. Tr. 1563-69; 1667-69; D. DPI. Rem. No. 22.

117. Compare 12 Del. C. § 1006 and § 1028.

118. See *Wright v. Council of City of Emporia*, 407 U. S. 451 (1972); *United States v. Scotland Neck Board of Education*, 407 U. S. 484 (1972); *Keyes v. Denver School District No. 1*, 413 U. S. 189 (1973).

quinimink is relatively easy. Only DeLaWarr's plan sought to include Appoquinimink, and then only for the sake of logical consistency in urging a "County-Wide" plan, since Appoquinimink would be treated as a separate "attendance area".¹¹⁹ Another district partially within the county was excluded since it has no school buildings in the area.¹²⁰ As *Milliken* emphasized, the task before the Court is to remedy the violation found. 418 U. S. at 738. The Court cannot conclude on the present evidence that Appoquinimink would in any way have properly been part of the exercise of discretion of the State Board in eliminating the dual schools at the time of the Educational Advancement Act.¹²¹ The district was created by the reorganization, as a combination of the former Odessa and Middletown districts.¹²² Moreover, the district is apparently operating a unitary system which is approximately 70% white.¹²³ Its schools are located in the approximate center of the district, a substantially greater distance from the major black population centers in Wilmington and DeLaWarr than any other district. Since its inclusion would in any event be of very little impact on the existence of predominantly white or black schools in other areas of the county, we have determined that Appoquinimink need not be included.

Newark School District has also urged that it is too far distant from Wilmington to make its inclusion proper, saying *inter alia*, that transportation time would increase greatly.¹²⁴

119. See D. DeLaWarr Rem. No. 2 at 160, and No. 3.

120. This is the Smyrna District, which is south of Appoquinimink, and whose boundaries cross from New Castle County into Kent County. See D. DeLaWarr Rem. No. 3; Tr. 1933-34.

121. See generally, 393 F. Supp. at 445.

122. See PX-23-0 (liability phase), at frontpiece.

123. See D. DPI. Rem. No. 24 at 1. The enrollment of the district as a whole is 72.2% white, and the schools range from 69.0% white to 76.3% white, an insignificant variation in light of the fact that the variation is centered in the elementary schools which range from 70.2% to 75.6% white, which even in the school with the greatest elementary enrollment would amount to an actual difference of 35 pupils in an enrollment of 658.

124. See Tr. at 131, 1090; D. New. Rem. No. 4.

See, *Swann*, 402 U. S. at 30-31. It has also urged that Mount Pleasant and Conrad seek to include it for an impermissible reason, viz, the prevention of white flight to Newark following the desegregation of other schools in the area.¹²⁵

The mere existence of racial disparity in the enrollments of neighboring districts is not a constitutional violation;¹²⁶ and thus the existence of such a disparity is no grounds for ordering a remedy. It is clear from other cases, however, that the potential of white flight may be included in the exercise of the Court's informed discretion on what would constitute an appropriate remedy.¹²⁷ We have already determined that constitutional violation existed at the State level, and moreover, we have said that the effects of the pre-*Brown* segregation to which Newark was a party have not yet been dissipated.¹²⁸

Based on the evidence presented to us, we think it clear that Newark is not so far from some portions of Wilmington that a workable desegregatory school attendance plan could not be implemented. In fact, transportation times even on the longest and most unlikely routes were not so significantly long as to endanger health or welfare of students.¹²⁹ See, *Swann*, 402 U. S. at 30-31. The witnesses from Newark agreed that the present bus route times were not dispositive because the routes would have to be redesigned in light of whatever new assignments

125. See, e.g., Tr. at 890. In general, if Newark were excluded, its schools would remain more than 90% white (they are presently 94.2% white), while most of the schools in the other districts would have substantially greater black enrollments. See D. DPI. Rem. No. 18; D. Mt. Pl. Rem. No. 7.

126. See, *Milliken*, 418 U. S. at 756 (Stewart, J. concurring).

127. See, *Wright v. Council of City of Emporia*; *supra*, 407 U. S. at 465; *United States v. Scotland Neck Board of Education*, 407 U. S. at 490-91.

128. See 393 F. Supp. at 433 and n. 7.

129. See Tr. at 1123, 1130-31; see also, Tr. at 1064-83. It should also be noted that at present, vocational education students from Newark are bused out of the district and into Wilmington. Tr. at 283.

were made,¹³⁰ and that such assignments would most likely be made to include only those schools which were geographically near.¹³¹

It is difficult to say with any certainty that Newark would have been included in any reorganization had the State Board been entitled to exercise its discretion in 1968. Since Newark at that time had close to 12,000 students, the effect of the enrollment limitation may have been to foreclose Newark's inclusion.¹³² On the other hand, had the Legislature or the State Board considered desegregation as one of the appropriate goals to be accomplished in the course of reorganization,¹³³ very different criteria might have led to the consolidation of part of either Wilmington or DeLaWarr with part of the present Newark district. We do not, however, rest out holding on such post hoc rationalizations, and on what might have been. Rather, uncontradicted testimony indicates that the stability of any desegregation plan is enhanced by the inclusion of larger geographical areas and higher white populations.¹³⁴ The Court cannot ignore the fact brought so forcefully to its attention that desegregation is costly, in ways beyond dollars spent on additional equipment and training. The difficulties of declining tax bases, and the problem of preventing growth areas from maintaining the duality of schools in the Northern New Castle County area require the inclusion of Newark.

We note for the sake of clarity that the inclusion of Newark in the area to be desegregated does not *ipso facto* require the transportation of students from schools in the far western or southern fringe of the present district to schools in eastern Wil-

130. Tr. at 1138-39.

131. *Id.* Moreover, Newark found unobjectionable the time required to transport black children to Newark, focusing its objection instead on the time required to transport white children into Wilmington. Tr. 1235, 1240.

132. See 393 F. Supp. at 444.

133. *Id.* at 445.

134. See, e.g., Tr. at 890, 899, 983, 1007-08.

mington and vice versa. Newark shares this problem of distance with the New Castle-Gunning Bedford and parts of Alexis I. DuPont Districts, and shares as well the position of having some of its schools easily accessible to desegregation plans. The issue in assignment of students will be whether the assigning agency in the future meets its burden of showing that the existence of one race schools is not due to the maintenance of a dual system.¹³⁵

For reasons substantially similar, it is apparent that the remaining districts in Northern New Castle County not specifically addressed, *supra*, must also be included to remedy the inter-district violations found in the last opinion. We will not repeat that analysis, but say simply that the desegregation area which is required to remedy the effects of violations found in the instant case is that area presently comprised of the suburban districts of New Castle County north of the northern line of the Appoquinimink School District; and the District of Wilmington.

B. Numbers.

As we have noted the school age population of the Northern New Castle County area is 80,678, of whom 78.5% are white.¹³⁶ In the plans submitted to this Court, all the defendants based their enrollment projections on the assumption that every school in the desegregation area would be required to approximate those percentages in their enrollments.¹³⁷ In addition, one attack leveled at the plan proposed by the Wilmington School Board was that it left some schools "perilously" close to enrollment figures which would favor so-called white flight.¹³⁸

Ordinarily, racial enrollments of each school would not be a question to be addressed initially by this Court. As the Supreme

135. *Swann*, 402 U. S. at 26.

136. See, pp. 5-6, *supra*.

137. See, e.g., D. DPI. Rem. No. 8; D. DPI. Rem. No. 18; D. Mt. Pl. Rem. No. 2.

138. See, e.g., Tr. at 887-88.

Court said in *Swann*, assignment of students is first and foremost a function to be performed by local officials in light of local conditions. We do not propose the imposition of definitive racial quotas for particular schools. *Swann*, 402 U. S. at 24, 26.¹³⁹ What we set forth here is not a determination of a "quota". Rather, it is a statement of what will be considered a desegregated school upon any necessary review of actual assignments made by local officials.¹⁴⁰

The question to be considered, therefore, is what constitutes a *prima facie* "one race" school within the context of the desegregation area. A "one race" school for these purposes will be defined as a school whose racial enrollment figures indicate that its population is substantially disparate from the expected range of enrollments in a genuinely nondiscriminatory system, allowing for a variation in pupil assignments.¹⁴¹ The starting point of any such analysis must be the actual school population figures for each grade of the school system as a whole.¹⁴² To that figure must be added a variational range, which is reflective of the informed judgment of the Court on how actual enrollments will affect the perception of the community on whether the school is

139. "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate the schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U. S. at 24.

140. That is, the function of racial enrollment figures is to serve as a signal to both the assigning officials and the Court on review of their actions, of whether the system has in fact been desegregated or remains dual. *Milliken*, 418 U. S. at 741, n. 19; *Swann*, 402 U. S. at 26.

141. A range of variations is required, simply because students do not come neatly packaged in groups of 30 per grade with perfect racial balances. See Tr. at 908. There are also variations in the racial enrollments between school levels, e.g., there are more black students in elementary schools than in high schools. See Tr. 2572.

142. See, *Swann*, 402 U. S. at 24-26.

in fact desegregated, or is predominantly of one race;¹⁴³ and the psychological impact of the number of students upon the members of the minority.¹⁴⁴

The figure of approximately 15% variation on either side of the actual minority schoolage population has been mentioned to the Court as the "usual figure".¹⁴⁵ Here, however, that figure would produce the substantial possibility of minority enrollments of under 10% in predominantly white schools. The testimony to the Court has been uncontradicted that such a figure presents severe difficulties in the "identity" of minority youngsters, who would not see fellow minority students in positions of leadership in the school.¹⁴⁶ Moreover, the 15% variation would allow enrollments in schools at the higher end of the range to approach 40% black enrollment, a figure which is said to produce a substantial likelihood of white flight.¹⁴⁷ Taking into consideration all of the factors in the present case, including those already described, the geographical proximity of the area and the transportation network available, the Court will consider that any school whose enrollments in each grade range between 10 and 35% black to be a *prima facie* desegregated.¹⁴⁸ We emphasize, however, that the assignments made by the local authority must remedy the existence of dual schools and must otherwise be designed to achieve the greatest possible degree of actual desegregation.¹⁴⁹ School officials making the assignments may, if they

143. See Tr. 898-900, 992-93.

144. See Tr. at 904, 905-06; 2350-02; 2417-18; 2426.

145. See Tr. 2571, *et seq.*

146. See citations, note 144, *supra*.

147. See Tr. at 887, 905, 983.

148. Some schools on the far edges of the county may necessarily remain all or predominantly of one race because of transportation problems or other practical difficulties. In those instances, the assigning authority will bear the burden of showing that assignments were genuinely nondiscriminatory. See, *Swann*, 402 U. S. at 26.

149. *Swann*, 402 U. S. at 26.

choose, follow a much stricter percentage range whether for reasons of preventing white flight, or otherwise.¹⁵⁰

C. Governance.

In ordering reorganization or consolidation of existing districts, we must define who will be charged with the operation of the system on a day-to-day basis. We repeat that the State Legislature and the State Board of Education may take such steps as are not violative of constitutional rights to change the pattern set here. Although the following governance devices should thus be regarded as interim pending such action by the State, they will necessarily remain operative for so long as the State takes no action.

The governance of the reorganized desegregation area shall be by a board whose membership will initially be composed of certain representatives from existing boards. Delaware State law presently provides that a school board be composed of five members, except vocational-technical school boards which are made up of seven members.¹⁵¹ A board of this size is small enough to

150. The record before the Court indicates that racial enrollments within a small range are possible if school officials so determine. Tr. 2526.

Our Brother Layton's concurring and dissenting opinion seemingly advocates the adoption of a variation of the Wilmington Metro Plan, our objections to which are discussed in another section of our opinion.

For the sake of clarity, we emphasize that the racial characteristics of the population of the area as a whole are the necessary starting point in determining whether a school is disproportionately of one race. See *Swann*, 402 U. S. at 26. Our figures of not less than 10% nor more than 35% black, which signal the prima facie achievement of a desegregated school, are not arbitrary figures, but are drawn from the record as described, *supra*, pp. 60-62. Whether the result is commensurate with the constitutional standard established in *Swann*, 402 U. S. at 26, must await the actual assignments by the proper authorities to achieve "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Mobile County School Comm'rs.*, 402 U. S. at 37.

151. 14 Del. C. §§ 1052, 1064.

work closely together and to be called together quickly to deal with policy matters. To provide the same per capita level of representation to all constituents as at present would, in an area the size of the desegregation area, require a much larger board.¹⁵² Moreover, the Court would have to be concerned with the division of that number among the districts, either on a geographical basis or a population basis.¹⁵³

The interim board will therefore be appointed in accordance with the system used in the reorganizations under the Educational Advancement Act. That is, the new board will consist of five members appointed by the State Board of Education from among the existing boards of the component districts.¹⁵⁴ The discretion of the State Board will be controlled to provide some geographical range and population equality only to the extent that one member of the interim board shall be appointed from the present Wilmington Board; one from the Newark Board; one from either the New Castle-Gunning Bedford, DeLaWarr or Conrad Boards; one from Stanton, Marshallton-McKean or Alexis I. DuPont; and one from Alfred I. DuPont, Mount Pleasant or Claymont.

We are aware, of course, that this method will leave some existing boards without a representative on the interim board. Given the choice, however, between devising our own method of selection or election, and following as nearly as possible the present State law, we have chosen to follow State law, which we

152. Assuming that the reorganized districts were to have a peak enrollment of 12,000 students and be controlled by a five person board, there would be a ratio of board members to students of 1 to 2400. To achieve that same ratio where 80,678 students are involved would require a board of 33 members.

153. The component districts range in enrollment from Newark which has 20.9% of the total enrollment of the desegregation area, to DeLaWarr which has 3.9%; Wilmington has 17.1%; Alexis I. DuPont has 4.03%; Alfred I. DuPont has 12.7%; Claymont has 4.09%; Conrad has 6.61%; Marshallton-McKean has 4.6%; Mount Pleasant has 6.03%; New Castle-Gunning Bedford has 11.1%; and Stanton has 6.61%. Figures derived from D. DPI. Rem. No. 24.

154. See 14 Del. C. § 1065.

deem reasonable under the circumstances. There do not appear to be any potential conflicts of interest among the suburban districts which would require their individual representation. Any potential problems which do arise may be minimized by allowing extensive advisory opportunities for the existing district boards, during an interim period, or by seeking to have the State Board and the State Legislature change the existing mode specified by statute.

The interim board so appointed will be responsible for the operation of the school system in accordance with 14 Del. C. §§ 1041, *et seq.*, until such time as the State may adopt changes. Included in these responsibilities will be the initial assignment of students for the purposes of desegregation; and the levying of necessary taxes, *etc.*, as well as the hiring of faculty and the choice of curriculum.¹⁵⁵

For reasons discussed *infra*, this Court will stay the operation of certain phases of this Opinion until time for final review has passed. The present school boards will continue to maintain their responsibilities during the stay. Nonetheless, the State Board should immediately undertake to appoint the new board, so that that group may begin its planning and other necessary operations. The interim board shall be required to make initial assignments for the fall of 1977, subject to the supervision and control of the State Board of Education, which bears the final responsibility for compliance with the orders of this Court. We assume the State Board will act with sufficient speed to allow the planning and assignment to be made within a time frame which will allow review by the State Board.

Under the provisions of state law, the old boards of the component districts will be dissolved upon the interim board's assuming full responsibility in accordance with this Opinion.

155. The powers of this Board will, of course, be circumscribed by the general powers of the State Board under 14 Del. C. §§ 121, 122; and the decisions of the new board would be in accordance with the regulations which the State Board is empowered to make.

The appointed members of the new board will serve in their capacity as members until elections for new members can be held in the reorganized districts in accordance with existing state law¹⁵⁶ or in new election districts designed by appropriate State authority.

VII. *Other Issues of Consolidation.*

Also before the Court are several categories of issues which relate principally to the operations of the consolidated district. For convenience, these issues are treated here seriatim.

A. *Faculty.*

Most of the plans submitted to the Court included provisions for the implementation of an "affirmative action plan" with regard to the hiring and assignment of faculty in a desegregated fashion. The Court is cognizant of the difficulties which may be involved in switching from a system of separate districts, and the potential for abuse which is present.¹⁵⁷ We are also cognizant that as a matter of law, racially identifiable faculties are one signal of a racially identifiable school, and the Court, in examining the results of any plan, must necessarily be aware of those figures.¹⁵⁸ Several difficulties arise in the present case, however. We have no figures in the record to indicate whether there is a substantial disparity in racial makeup of existing staffs. We have no evidence of violations by the present boards, except some hint that there are presently actions by the Equal Employment Opportunity Commission pending in this regard.¹⁵⁹ Under these circumstances, we have no record upon which to determine the scope of any alleged violation, and no basis upon which to order an affirmative action plan.

156. See 14 Del. C. §§ 1051, 1052.

157. See Tr. 941, 2354-57, 2405-07, 2518-21, 2825-27.

158. See generally, *Keyes v. Denver School District No. 1*, 413 U. S. at 202; and *cf. id.* at 206.

159. See Tr. at 2359.

The second major issue with regard to faculty relates to the decision of whether to require "leveling up" of staff salary and benefits as part of the reorganization. This issue arises because at present the teachers and staff throughout the districts have separate bargaining agents and have separate contracts with each of the districts.¹⁶⁰ The issue of "leveling up" arises with particular force because the initial annual cost of doing so has been variously estimated as an additional 14 to 6 million dollars or more.¹⁶¹

Testimony before the Court indicated that as a matter of preference in educational circles, "leveling up" is beneficial, since it eases labor strife. In fact, as part of the reorganization of the schools under the Educational Advancement Act, "leveling up" was required.¹⁶² Briefs of certain of the parties have urged that we consider leveling up; and the State teachers' organization, the Delaware State Education Association, as an amicus, has taken the position that such leveling up is required in order to prevent disruption in the schools as part of the desegregation process.

We decline to order leveling up, for several reasons. First, as we have made clear, we do not by this Opinion intend to "freeze" the organization of schools within the area. We therefore cannot be sure, especially since there was no testimony before us upon which we could even estimate the nature of the differences, to what level salaries in differing combinations of districts might have to rise. Moreover, the issue is directly related to local policies and practices with regard to education and employer-employee relations. If any contractual changes are required, the new board appointed pursuant to this decision

160. The faculty and staff salaries are funded in part by the State which establishes a "floor". Local districts may then supplement this amount with local funds according to agreements made with local teacher representatives. See 14 Del. C. § 1711.

161. Tr. 2247; Int. Plaintiffs' Exh. Rem. Nos. 9, 10; D. Nw Rem. No. 10.

162. 14 Del. C. § 1009.

or its successor or successors ought to make such a determination. Any decision affecting tax rates and day-to-day operations which is not necessary for the actual desegregation of the schools, is better left in the first instance to the local decision makers. See *Milliken*, 418 U. S. at 743-44.

B. Hispanic Students.

The Court allowed representatives of the Hispanic population in the area to intervene to protect the existence of certain bilingual programs and to insure that the success of those programs would not be endangered by any plan which the Court might order.

Our allowance of the intervention and our comments here are designed only to protect the program as it now exists. We make no determination on the present adequacy of compliance with the requirements of 20 U. S. C. §§ 880b, *et seq.* Nor do we here find that the members of the Hispanic population have otherwise been victims of any discriminatory action on the part of any school district which is a part of this litigation.¹⁶³

With regard to those students already identified as requiring bilingual education, or who are otherwise taking part in such education now, the interim board or such other board or boards as may be appointed by the operation of state law, shall in the course of implementing this decision insure that those students will be placed in schools in sufficient numbers to allow the program to continue; and shall insure that the program will not be reduced or cut back as to those students presently receiving it. In all other respects, we assume that the new district or districts will comply with the requirements of federal law in this regard, including those statutes or regulations of HEW which may require the identification of other students needing such assistance and the provision of the programs made neces-

163. Cf., *Keyes v. Denver School District No. 1*, 413 U. S. 197 (1973).

sary thereby.¹⁶⁴ We also note that in enrollment statistics as provided by the State, Hispanic students are listed as a minority population,¹⁶⁵ and we assume that the new board or boards will so categorize them for purposes of determining whether a school is racially identifiable.¹⁶⁶

C. Exceptions to General Assignments.

For reasons of equity and practicality, the Court will exempt from any requirement of inclusion in desegregation plans certain students and types of students as follows:

First, there are several schools operating in the New Castle County area which serve various special students, *e.g.*, those who are orthopedically handicapped,¹⁶⁷ audially handicapped,¹⁶⁸ or otherwise eligible for special programs.¹⁶⁹ These schools are subject to the day-to-day control of the district in which they are located, and we have no evidence that they presently operate on other than a nonracial basis. We see no reason to change the operation of these schools or the special requirements which they might have with regard to qualification for entrance. The interim board and its successors may continue their operation in their present locations.

164. *See, e.g.*, 20 U. S. C. §§ 1703(f); 1921(b)(12); 20 U. S. C. § 800b *et seq.*; and *Lau v. Nichols*, 414 U. S. 563 (1974).

165. *See, e.g.*, D. DPI. Rem. No. 24.

166. We have heard no testimony on the question of whether Hispanic students would constitute a minority in Delaware for Fourteenth Amendment purposes, and we do not determine that the State Board or the local board or boards would be constitutionally required to treat the Hispanics as a minority group. The issue before the Court on the intervention was solely the protection of existing programs, and our Opinion is limited strictly to that question.

See generally, *Keyes v. Denver School District No. 1*, 413 U. S. at 197.

167. Leach School in DeLaWarr District, which draws from the county as a whole.

168. Sterck School draws from the whole State.

169. D. DeLaWarr Rem. No. 3 shows six special schools altogether.

Second, for reasons of practicality, the Court will not require two groups of students to bear the burden of any transfers from present schools which may result from this Opinion. Seniors in the year in which the plan goes into effect would suffer only if it became necessary to transfer their files from their present schools at a time when they are most in need of advice, letters of recommendation, and so on, in applying for further education or jobs. Moreover, they have developed strong attachments and loyalties to their present school, and will most likely be serving in positions of leadership in student organizations, whose continuation adds much to the community life of the school. Therefore, rising seniors will not be required to be reassigned.

For other reasons, the Court will not require the reassignment of kindergarten children. The program presently available in Delaware is for a half-day. The Court is aware of the difficulty in getting children of that age to and from school on a half-day basis, without requiring additional time for transportation. A half-day program is not so significant a part of the educational process as to demand it be made a part of any reassignment of children. Of course, any kindergarten desegregation which can be accomplished by means short of transportation to schools other than those closest to the child's home offering his level of program may and ought to be considered by the assigning agency.

Lastly, as to those children who are to be included in the desegregation plan itself, the Court will not at this time require any particular method. Several listings of the order of alternatives to be used are available. *See, e.g.*, 20 U. S. C. § 1713; *and Tr.* at 2492-96, 2504-06. In making their plans, the new board or its successors should make such changes in attendance boundaries, or other methods as will insure the desegregation of the schools as we have already defined it.

In order to assist in the orderly transformation to a unitary system, and to prevent any requirement of a burdensome

expenditure of funds in the first year of operation, the Court will allow the plan to become effective over a two-year period. The initial desegregatory assignments, especially in the high schools and intermediate schools, must be made for the fall 1977 term. Full compliance with constitutional requirements on all grade levels must be completed with the school year commencing in September 1978.

In achieving this goal, the Court will not prevent the utilization of any voluntary method of desegregation, so long as the schools are actually desegregated in accordance with the timetable set forth. Thus, if the new board were to try magnet schools to desegregate the upper elementary grades during the first year of operation, the Court will follow the attempt with great interest. Regardless of the success of that endeavor, however, the Court will require the plan to achieve actual effective desegregation for all affected grades by the second year of operation, by whatever methods should reasonably become necessary.

D. Vocational Technical Schools.

The Court was urged by the Intervening Defendant, New Castle County Vocational Technical Board of Education ("VoTech Board") to address the operation of vocational-technical schools in the desegregation area. At present, the operation of the schools in the area is not uniform. One school is operated by the VoTech Board, which taxes county-wide to support it. Two other schools are funded separately by the districts in which they are located, Wilmington and Newark.¹⁷⁰ The Court considers the mode by which such education is delivered to the students and the supervising body of such schools to be a matter left to the discretion of state authorities. Absent a showing that the present method offends constitutional guarantees, the Court has no power to interfere. *Cf., Milliken*,

170. In actuality, the VoTech school located in the Newark area is not yet in operation. This school, the so-called Hodgson Career Center, will open in the fall of 1976.

418 U. S. at 744-45. Those schools presently operated by districts to be merged into the reorganized district will become the responsibility of the new board or its successor. The Del-Castle Center will continue its operation as at present, subject to any change to be made by the State, or its agencies.

VIII. Effect of 20 U. S. C. §§ 1701, *et seq.*

The Court requested briefing on the effect of certain amendments to the Equal Educational Opportunity Act passed by Congress in 1974.¹⁷¹ After consideration of the issues raised by the briefs, and an examination of the terms of the Act and the legislative history, it is our view that we have complied fully with the statutory requirements applicable here.

We note first that Congress explicitly stated that it did not intend to modify or diminish the powers of the courts to enforce fully the Fourteenth Amendment to the Constitution.¹⁷² This section was based on a Senate provision included as a declaration of policy by the Conference Committee.¹⁷³ Moreover, the courts

171. Act of August 21, 1974, 88 Stat. 514, 20 U. S. C. §§ 1701, *et seq.*

172. See 20 U. S. C. § 1702(b).

173. See Sen. Conference Rep. 93-1026, reprinted in 1974 U. S. Code Cong. & Admin. News, Vol. 3, 4206 at 4219. The effect of this section was critical in the debate over passage of the Act. As originally drawn by Rep. Esch of Michigan, the amendments had no such proviso. See 129 Cong. Rec. H. 2158 (March 26, 1974). [All Cong. Rec. citations are to the daily edition.] Following attempts at substitution of other provisions, 129 Cong. Rec. H. 2166 (remarks of Mr. Anderson, March 26, 1974), the House passed the Esch bill as an amendment to the Education Act. 129 Cong. Rec. H. 2177.

The Senate refused to agree to the Esch bill, however, and passed differing legislation, which included the separate provision (the so-called Scott-Mansfield amendment) that the terms of the bill were not in any way to affect the power of the courts to deal with violations of constitutional rights. For a comparison of the provisions of each chamber, see 129 Cong. Rec. H. 7209 (remarks of Mr. Quie, July 25, 1974). The Senate rejected the Esch bill only narrowly, but the Senate Conference Committee refused to agree

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which have considered the matter have held that the law should not be read as diminishing the power of the courts to deal with violations which have been found. *See Brinkman v. Gilligan*, 518 F. 2d 853 (6th Cir. 1975), *cert. denied*, 44 U. S. L. W. 3331 (1975).¹⁷⁴

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to any bill which did not include that disputed language. The House was similarly intransigent and instructed its Committee several times to stand by its original language. *See, e.g.*, 129 Cong. Rec. H. 5844-45 (June 27, 1974); 129 Cong. Rec. H. 6815 (July 22, 1974).

Finally, because the bill provided funding for certain other educational programs and was greatly desired, the Conference Committee agreed to the inclusion of the Senate language as a part of the Congressional policy statement. *See* Senate Conference Report, *supra*. The supporters of the original legislation in the House responded with accusations of betrayal, and the statements that the results of the amendment was the effective "gutting" of the provisions of the bill dealing with remedy. *See, e.g.*, 129 Cong. Rec. H. 7402 (remarks of Mr. Esch, July 31, 1974); H. 7406 (remarks of Mr. Landgrebe, July 31, 1974); H. 7410 (remarks of Mr. Parris, July 31, 1974); H. 7414 (Mr. Bauman, July 31, 1974).

The members of the Conference Committee from the House responded by saying that the effect of the provision was only to insure that the courts would have the opportunity to review the legislation for constitutionality, *see* 129 Cong. Rec. H. 7413 (remarks of Mr. Lehman, July 31, 1974), an understanding which flies in the face of the language itself and the powers of the federal courts since *Marbury v. Madison*, 5 U. S. (1 Cranch) 137 (1803). Although generally the remarks of those who oppose the passage of legislation are not convincing as to its purpose and meaning, because of their zeal to defeat it, *see Ernst & Ernst v. Hockfelder*, U. S., 44 U. L. W. 4451, 4457 n. 24 (U. S. March 30, 1976); here such remarks are useful to show that the language was seen as changing the original House bill to something quite different from the intent of the framers of the original legislation. This is particularly true when the Senate Committee members in their remarks to their own house made the same point in support of the amendment as accomplishing what the Senate had desired. *See, e.g.*, 129 Cong. Rec. S. 13382 (remarks Senator Javits, July 24, 1974).

Our understanding of the effect of that provision is therefore the most logical reading of both the language on its face, and its intent by the framers.

174. *Cf., Swann, supra*, 402 U. S. at 17, *construing* 42 U. S. C. § 2000c.

Any findings required by § 1715 have been set forth *supra* as part of Section V(C) of this Opinion.¹⁷⁵ The requirements of §§ 1715 and 1756, that district lines cannot be altered absent certain showings related to purpose and effect of segregation have been met in the prior opinions of this Court. It is true that in the last opinion we refused to hold that the Educational Advancement Act was passed for racially discriminatory purposes.¹⁷⁶ There was no need in that opinion to so hold, nor do we find such a need here. Construing the language of the statute requires us to read "purpose" in light of the prior holdings of the Supreme Court with regard to the Fourteenth Amendment. In particular, "purpose" must be construed in light of the holding in *Milliken*, the language of which is similar. We note that the original legislation, available as early as March, 1974, was introduced in specific response to the District Court order in *Milliken*, 129 Cong. Rec. H. 2160. We have found that the lines drawn in the instant case were drawn with the effect of precluding Wilmington; and that such a decision was made *knowing the effect*. The decisions of the Supreme Court are clear that knowingly to make a suspect classification is sufficient to create a Fourteenth Amendment violation. "Dominant purpose" of the legislators is not and never has been the key to such holdings. *See Wright v. Council of City of Emporia*, 407 U. S. at 461-62. To read the statute otherwise would require us to vitiate the language found in § 1702(b). We refuse to do so.¹⁷⁷ We also note that § 1756 specifically refers to actions within the school districts which have segregatory effects. Such actions have previously been described in our opinions.¹⁷⁸

175. 20 U. S. C. §§ 1715 and 1756 deal with the preservation of existing district lines, absent particular findings.

176. 393 F. Supp. at 439.

177. *See generally, Vorchheimer v. School Dist. of Philadelphia*, F. 2d, No. 75-2005 (3rd Cir., March 16, 1976), at 11.

178. We note that this reading of the meaning of purpose is in accordance with the views expressed by the Senate Conference Committee who were the drafters of the language. "In this case what

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The 1974 amendments also include a provision requiring the stay of any order until the time for final appeal has run. *See* 20 U. S. C. § 1752; *cf.*, *id.*, § 1757. Those provisions are not controlling here, since this opinion deals with a remedy for *de jure* and not *de facto* segregation. *See Morgan v. Kerrigan*, 523 F. 2d 917, 920 (1st Cir. 1975), *pet. for cert. filed*, 44 U. S. L. W. 3614 (U. S. April 27, 1976) (No. 75-1445), and cases cited therein. Nonetheless, we feel that a stay is appropriate here in some respects.

First, we acknowledge the Congressional policy expressed. Moreover, it is clearly within the discretion of the Court to approve a stay where the factual situation warrants it. *See Scripps-Howard Radio, Inc. v. FCC*, 316 U. S. 4, 9-10 (1942); All Writs Act, 28 U. S. C. § 1651. Here, the rights of the parties demand that certain aspects of the Opinion be carried out immediately, while portions be stayed. Thus, the State Board will be required to name the members of the Interim Board, and that group will be required to begin its planning and preparation immediately. Taxation of residents; liability to bondholders; contracts with teachers and staff; and title to property in the event of changes in the pattern of reorganization are properly issues of concern to the interim board. To avoid disruption in the administration of the schools for the upcoming year, actual vesting of full responsibility in the new board for the

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[the bill] basically provides—and I do not agree with this because I think busing is a necessary tool, it should not have too many restrictions on it—is that no youngster may be bused beyond the second nearest school to him unless it is in accordance with the Fifth and Fourteenth Amendments to the Constitution of the United States.” 129 Cong. Rec. S. 13349 (Senator Pell, July 24, 1974). Similarly, Senator Javits in support of the Conference Committee report spoke of the provision as requiring only an “affirmative showing” of a violation of the constitutional rights of individuals. 129 Cong. Rec. S. 13382 (Senator Javits, July 24, 1974).

The bill was addressed, it should be noted, to transportation plans, not consolidation plans. *See* 129 Cong. Rec. H. 2160 (Mr. Esch, March 26, 1974), and remarks of Senator Pell, *supra*. Nonetheless, the Senate language is helpful as it also speaks to “purpose”.

day-to-day operation of the schools will be delayed until September 1977.

The State Board shall set a day certain prior to September 1, 1977, when full responsibility will be transferred to the new board. Prior to such transfer, any expenses incurred by the new board shall be the responsibility of the component districts and the State Board. The State Board is also directed to select a name for the reorganized district or its successors, in the event the new board is unable to agree on such a name.

During the period prior to September 1977, and the transfer of full responsibility to the new board, the existing component boards may, of course, cooperate in attempting to implement magnet or other proposals which might achieve some level of desegregation.

IX. Miscellaneous Other Issues.

The Court was asked to rule on certain other matters which relate principally to the ongoing operation of the new districts which might be formed, and of other areas of state law. The present record does not allow us to rule on these motions, and any decision with regard to them must be left for further actions to be initiated by complaining parties in light of further developments.

The first issue relates to the imposition by the Court of limits on further growth of certain schools which it is urged will still be operated as predominantly white schools. This was suggested to the Court as a means of restricting the scope of any actual transfer of students, while preventing the continuation or expansion of a dual system. The present record and the plan ordered by the Court herein do not now require us to make such an order. We must assume that the local authorities charged with the implementation of the plan will do so in good faith, and will follow existing law with regard to the construction of new facilities.¹⁷⁹ If they do not, we are certain that interested parents will

179. *See, e.g., Swann*, 402 U. S. at 20-21; *Keyes v. Denver School District No. 1*, 413 U. S. at 201-02.

insure that a proper remedy is pursued. Until an assignment plan is drawn by the new board and approved by the State Board, we have no way of knowing how many, if any, schools will be identifiably one-race majority schools, nor where those schools would be located. As part of its burden in justifying the existence of those schools, the local authorities should include whatever safeguards they feel are needed to prevent maintenance or creation of dual schools.¹⁸⁰

B. Private Transportation.

In the prior opinion, we found that the subsidy provided by the State to cover the transportation of students to private schools had some effect on maintaining the racial disparity between the Wilmington and suburban school populations.¹⁸¹ The plaintiffs have continued to press this point to the Court as a ground for relief against the State. The Court understands that the subsidy presently costs the State upwards of 700,000 dollars per year,¹⁸² which the plaintiffs urge could be used for other purposes. We are urged on the basis of its racial effects to declare the statute unconstitutional, and enjoin its operation.

We refuse to so hold. Our previous finding indicated only that the effect of the statute was to assist in maintaining racial disparity. We assume for present purposes that the remedy which we have ordered is complete, and will end the existence of a dual system. Any injunction against the continuation of the State's policy of providing this subsidy must await a showing of its effects under the operation of the remedial plan here ordered. Other possible grounds of unconstitutionality were not raised by the parties, and are not ruled upon. Plaintiffs' motion for an injunction to prevent payment by the State of any subsidy for transportation to private schools is hereby denied.

180. See *Swann* at 20-21; Tr. at 2511-12.

181. See 393 F. Supp. at 436-37; 14 Del. C. § 2905.

182. See 393 F. Supp. at 436, and *cf.*, Tr. at 1493.

C. Monitoring the Remedy.

Lastly, we have been urged to appoint a monitoring commission, to oversee the development and implementation of the plan.¹⁸³ On the present record, we see no need for such a commission to be invested with power by the Court. The existing committees have derived their power from the concern of State or local officials and groups. To add the power of the Court to these groups would raise disturbing issues of how to support and supervise such an ad hoc "master".¹⁸⁴ The parties before the Court include school districts, with their associated expertise and staffs, which will continue in existence up to the actual implementation and beyond; and the State Board of Education with its statutory supervisory and appeal powers.¹⁸⁵ The Court also takes judicial notice that in the past the State has implemented desegregation decisions in good faith. We have no reason to find that the present course of events will differ in that regard. Absent showings of bad faith or obstruction which are not present here, we see no need for a special master or other monitoring body.

The operation of public schools is traditionally a matter of local concern, and properly so.¹⁸⁶ This Court has intervened only reluctantly in that process, and only for limited purposes. We

183. The Governor's Committee on the Schools Decision, appearing as an amicus, filed a paper on the need for such an agency, and volunteered to serve as the nucleus of such an organization. The Court is also aware that various concerned citizens have begun preparations to assist in efforts to make the implementation of the plan smooth and peaceful.

184. See generally, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 Yale L. J. 1338 (1975), discussing the difficulties of a monitoring commission appointed in Alabama as a result of litigation concerning the operations of a state mental hospital. *Wyatt v. Strickney*, 344 F. Supp. 373 (M. D. Ala. 1972), *modified sub. nom.*, *Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974).

185. See, e.g., 14 Del. C. §§ 121, 122, 1058.

186. See *Milliken*, 418 U. S. at 741-42; *San Antonio School District v. Rodriguez*, 411 U. S. 1 (1973).

were urged throughout the hearings in this case to be concerned with the "quality of education" offered by the area schools. That is much more properly the concern of local officials and the parents of children in the schools. Our duty here is not to impose quality education even if we could define that term, though we must be conscious that the implementation of the remedy does not defeat the ability of local agencies to fulfill their duty to offer it. We do not find in *Brown v. Board of Education*, 347 U. S. 483 (1954), a mandate for District Courts to concern themselves with how well the educative function is performed. The decision in *Brown* was rather that the operation of a dual school system, based on race, is an impermissible classification under the Fourteenth Amendment.¹⁸⁷ There has been much discussion, and there undoubtedly will continue to be much writing upon the topic of whether black children learn better in desegregated classrooms.¹⁸⁸ Our holding does not rest upon those considerations, not least because judges are unqualified and inexperienced in answering such questions.¹⁸⁹ Rather, we have found a constitutional violation in the racially suspect treatment of Wilmington during a school district reorganization, and other actions in the past by the State and local authorities. We believe that those violations, upon the implementation of this Opinion, will be remedied. Therefore, we dissolve the three judge panel convened for these purposes. Under the obligation imposed upon the District Court by *Evans v. Ennis*, 281 F. 2d 385, 391 n. 1 (3rd Cir. 1960), supervisory jurisdiction will remain in the District Court. Further

187. See, e.g., *United States v. Jefferson County Bd. of Educ.*, 372 F. 2d 836, 871 at n. 76 (5th Cir. 1966); see generally, Fiss, *Racial Imbalance in the Public Schools: the Constitutional Concepts*, 78 Harv. L. Rev. 564, 590-98 (1965); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959); Read, *The Judicial Evolution of the Law of School Integration since Brown v. Board of Education*, 39 Law & Contemp. Prob. 7, 9 at fn. 11 (1975).

188. For a review of the recent literature on the subject, see Symposium *The Courts, Social Science and School Desegregation*, 39 Law & Contemp. Prob. 50, *passim* (1975).

189. Cf., *Milliken*, *supra*, 418 U. S. at 744.

action will be taken, however, only upon the initiation of the parties by proper motion or complaint.

Submit Order.

/s/ JOHN J. GIBBONS,

Circuit Judge,

/s/ CALEB M. WRIGHT,

District Judge.

LAYTON, *District Judge* (concurring in part and dissenting in part):

The Court has today approved a sweeping plan for the desegregation of the Wilmington School District (Wilmington) which requires the busing of students across school district lines.

For reasons hereinafter expressed, I concur in that part of the majority opinion which requires interdistrict busing, but dissent from the plan proposed by the majority.

In *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975), in which I dissented, a majority of this Court declared unconstitutional that portion of the Educational Advancement Act (EAA) which required that the boundaries of the Wilmington School District remain unchanged,* and additionally found, not only that the effect of this act, but also of certain discriminatory practices on the part of the Delaware Real Estate Commission, local housing authorities, etc., tended to lock huge numbers of Blacks within the City, thus contributing to the existence in Wilmington of a school population 84.7% Black and 9.8% White.*

Almost simultaneously with *Evans*, the Supreme Court decided *Milliken v. Bradley*, 418 U. S. 717 (1974). In this landmark opinion, the Court stated, *inter alia*, at page 755:

* This Act permitted the State Board of Education to redraw a number of school district boundaries but provided that the lines of the Wilmington School District, a predominantly Black district, should remain as heretofore.

* There are also approximately 800 Hispanic, Oriental and "other" students in the District who make up the remaining 5.5% of the school population.

This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situation. Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or re-drawing school district lines, see *Haney v. County Board of Education of Sevier County*, 429 F.2d 364; cf. *Wright v. Council of the City of Emporia*, 407 U. S. 451; *United States v. Scotland Neck Board of Education*, 407 U.S. 484; by transfer of school units between districts, *United States v. Texas*, 321 F. Supp. 1043, aff'd, 447 F.2d 441; *Turner v. Warren County Board of Education*, 313 F. Sup. 380; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines might well be appropriate." (Emphasis added.)

A comparison of the language of *Milliken*, just quoted, with the findings of fact and law of the majority of this Court in *Evans*, now affirmed by the Supreme Court, makes it crystal clear that unless the Wilmington schools could be reorganized into a single integrated system, then a Court-ordered plan for the interdistrict busing of Black and White students both into and out of Wilmington should be ordered.

Now, it was obvious at the start that any plan to desegregate Wilmington without interdistrict busing, a "Wilmington Only" plan, was going to be extremely difficult in a city school system that is 84.7% Black, 9.8% White, and 5.5% "other" students. For instance, presently, Elbert Elementary School is 97.6% Black; Stubbs Elementary, 97.6% Black; Drew Elementary, 98.2% Black; Bancroft Middle School, 96.3% Black. Clearly, something more than a mere realignment of the 1,360 White students among the most heavily Black schools would be required. In this connection, Justice Powell in *Keyes v. School District No. 1, Denver, Colo.*, 413 U. S. 189 at 23, and Justice Brennan, in *Green v. County School Board*, 39 U. S. 430, at 435, made statements which should give some guidance to anyone faced with formulating a plan for the desegregation of a heavily Black city.

At page 226 of *Keyes*, Justice Powell stated:

" . . . A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction, and curriculum opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close old ones, and determine the size and grade categories with this same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind."

And at page 435 of *Green*, Justice Brennan wrote for a unanimous Court:

" . . . Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro." (Emphasis added.)

But when the "Wilmington Only" plan was presented, it was clear that the State Board had done no more than reshuffle the 1,300-odd White students among the most heavily Black schools in the City.* In fact, it was conceded by counsel for the State Board of Education that the plan had been prepared without reference to the statements from *Keyes* and *Green*, just quoted. Perhaps the State Board felt that because of the unusually heavy imbalance of Black and White students, no satisfactory "Wilmington Only" plan could be devised. In any case, it was not done. And in fairness, I will admit the chances that an acceptable plan could be developed under the circumstances of this case were very remote. Accordingly, I agree with

* Even after this reassignment of White students among Black schools, the latter would remain heavily Black. Thus, Elbert would be 79.8% Black; Stubbs, 86.5% Black; Drew, 75.7% Black; and Bancroft Middle School, 88.1% Black.

the majority that the "Wilmington Only" plan as submitted falls far short of meeting constitutional standards.

Since the "Wilmington Only" plan fails to eliminate the dual system of education in Wilmington, there remains no alternative to a Court-ordered interdistrict busing plan. Various school boards and other groups submitted plans which were analyzed and found wanting by the majority. Nor am I persuaded that any one of these plans presents a satisfactory solution. For a time I was interested in the theory of the so-called "magnet" plan. This plan is based on the premise that if enough attractive courses in various subjects are offered in strategically placed schools through the County, enough Black students would voluntarily elect to be bused out of the City, and enough White students would elect to be bused into the City to desegregate Wilmington on a voluntary basis. The idea is superficially attractive. It would preserve the present separate districts throughout New Castle County. And it would be voluntary in concept. But, if successful, it would require a very large number of students to elect to be transported back and forth from Wilmington in order to desegregate a school district 84.7% Black and 9.8% White. The cost of transportation would be extremely heavy. Furthermore, the Supreme Court of the United States does not favor voluntary plans. *Green v. County School Board of New Kent County*, 391 U. S. 430 at pages 438-39, and most important, they have been universally unsuccessful where tried. Accordingly, but with regret, I feel there is no hope for a successful future for such a plan in this County.

This brings me to a discussion of the majority plan, which at the stroke of a pen abolishes all existing school districts in the County (except Appoquinimink) and creates one super district of some 80,000 students. It would include, for instance, Newark and New Castle, both small, incorporated cities having a district and separate entity of their own, neither of them contiguous to Wilmington, and each having its own busing

problems to which it does not desire to add those of Wilmington.*

In my judgment, there is no need to abolish nearly every school district in the County to create a workable busing plan. For many years this State has operated its educational program by dividing its school system into relatively small districts. In fact, all the school board witnesses who testified in this case favored the retention in any new plan of a number of small districts. One such member, also a parent, pleaded in favor of their retention. The reason obviously is that in a relatively small district, a very close relationship between parent, teacher and child can be maintained. This plan will inevitably affect that relationship. Perhaps, from a purely administrative point of view, a school system could be operated more efficiently with larger districts. One expert did so testify. But no one, to my knowledge, testified that the educational system, as compared with the administrative process, would suffer because of the operation of the school system through a number of small districts.

Secondly, I believe the majority erred in adopting the County school percentages of 80% White—20% Black as a basis for its ultimate conclusion that in desegregating Northern New Castle County, the percentage of Black students in any one school should not be more than 35% nor less than 10%.

In this connection, it applied a sort of "but-for" test; that is, "but-for" the failure of the housing authorities to build cheap, low-cost housing in the County and "but-for" the EAA which tended to lock large numbers of Black students into Wilmington, the ratio of school children in the Wilmington schools today would be 80% White and 20% Black instead of 9.8% White and 84.7% Black. From this, and allowing a variable factor of 15%, it arrived at the conclusion that in desegregating Northern New Castle County, the number of Black students in any one school should not be less than 10%, nor exceed

* Newark, for instance, buses some 11,773 students daily as a part of its own separate school program.

35%. I simply cannot accept the majority's hypothesis. No testimony was put into the record in support of the conclusion that "but-for" the constitutional violation, Wilmington schools would still be 80% White and 20% Black. No evidence as to the number of available City, as compared with suburban, jobs was adduced. The record contains no predictions as to how many housing units would now be available to Blacks in the suburbs, had the housing authorities presented a vigorous, low-cost housing program. There is no analysis of the transportation available to Blacks who might rent low-cost housing. Nor has the recognized tendency of ethnic groups to live together in certain localities been taken into account. I concede that "but-for" the weak housing program and the unconstitutional feature of the EAA, there would be fewer Blacks today in the City but I doubt if the difference would be substantial, and in any case, there is no evidence indicating how these numbers could be calculated. As I view it, the result drawn by the majority from its "but-for" test represents no more than a bald assumption unsupported by evidence.

My strongest objection to the majority plan is the huge number of students who will have to be bused in order to comply with the requirement that no school, including Wilmington, should have more than 35%, or less than 10%, Black students.

The majority opinion requires that the racial composition of every school in the desegregation area, Northern New Castle County, reflect the racial mix of the desegregation area. Northern New Castle County has a school population of 80,678 students of whom 16,373, or 19.7%, are Black. Thus, the majority's opinion theoretically seeks a 4:1, White to Black, ratio in every school in the desegregation area.

The majority, however, recognizing that it would be impractical to reach a 4:1 ratio in every school in Northern New Castle County, decided that it would consider any school with a 10% to 35% Black enrollment as desegregated. Such flexibility is

required by the fact that all of the Blacks to be bused are located in a relatively small geographical area, in Wilmington and in DeLaWarr, and that several of the nearly all-White schools are located a significant distance from Wilmington and DeLaWarr.

At present, Wilmington has a total school population of 13,852 of whom, 11,733, or 84.7%, are Black. DeLaWarr, a district contiguous with Wilmington, has a total school population of 3,172 of whom 1,740, or 54.9%, are Black. All of the other districts in the desegregation area are more than 90% White.

In estimating the extent of the student shuffling required by the majority's plan, it should be noted that the smaller the number of Black students permitted to remain in the Wilmington and DeLaWarr schools, the greater the number of White students who must be bused in to replace them. Under the majority's plan, the Black enrollment would not be permitted to exceed 35%. Thus, the Black enrollment of these schools must be reduced from 13,473 to 5,958, and the White enrollment must be increased by an equal amount. This would require busing 7,515 Black students out of Wilmington and DeLaWarr and busing into these districts 7,515 White students from the suburbs. Thus, at a *minimum*, the majority plan requires busing 15,030 students for desegregation purposes.*

To summarize, the mandate before this Court is to desegregate the Wilmington schools. The majority instead, and unnecessarily, has desegregated all of New Castle County except Appoquinimink.

In so doing, it has eliminated, unnecessarily, every existing school district in the County except Appoquinimink and established a super district of 80,000 students.

* These figures are not exact because some students live within walking distance of their newly assigned schools and some students presently bused will simply be bused to a different school under the majority's plan.

And, lastly, based upon, I believe, a fallacious premise, it has arrived at an integration formula involving the busing of unnecessarily large numbers of students.

In the light of the above criticisms, it may be asked if there is a means by which Wilmington schools can be fairly desegregated on a much more modest scale. I am certain this can be done.

Preliminarily, I think we should look at the evil which enforced busing is required to remedy. In *Brown II*, 347 U. S. at page 494, a unanimous Supreme Court quoted with approval the following language:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Segregated schools, then, so it is said, deprive the Black students of their 14th Amendment right to receive "the equal protection of the law." The remedy required to desegregate a given school, according to *Brown II*, is to mix such a proportion of Whites to Blacks as to eliminate any "sense of inferiority" on the part of the Blacks. The difficulty has been that no guidelines as to the proper ratio of Whites to Blacks have ever been established. Accordingly, many lower courts faced with this situation have, in my opinion, for one reason or another, perhaps just to be on the safe side, required the busing of an unnecessarily great number of students. And I think the majority plan results in just that sort of overkill.

If we looked at a given classroom today in the Wilmington schools, we would see 9 Black seats for 1 White seat.* Clearly,

* This is, of course, theoretical in the sense that schools and their classes vary considerably in overall numbers as well as proportions of Black to White. However, the overall proportion of Whites to Blacks in the Wilmington School District is about 9 to 1.

no reasonable person could say that this proportion of Blacks to Whites represents a desegregated school. On this point, this Court is unanimous. Suppose, however, the proportion of Blacks to Whites were reduced to 3 Black seats for each 1 White seat; in other words, that the racial composition of each Wilmington school were reduced to $\frac{3}{4}$ Black to $\frac{1}{4}$ White. Could any reasonable person say categorically that a proportion of 1 White to each 3 Blacks did not create an atmosphere in which Blacks could learn without having a sense of inferiority? I believe the average reasonable person would say, "No." And this is particularly so when it is borne in mind that all the cases require that the faculty, staff, personnel, etc., of each school be realigned in the same proportions. Moreover, if it is argued that the proportions here recommended are based on no standard other than that of a reasonable person, I point to the fact not only that the majority's standard is also subject to serious question but in lieu of any other standard, that of the reasonable man, so long a standard of conduct in negligence law, should be acceptable.

If a ratio of $\frac{1}{4}$ White to $\frac{3}{4}$ Black were acceptable, as I advocate, then in order to accomplish the suggested racial mix, 2,000 Black students must be bused out of, and 2,000 Whites into, Wilmington.*

The next question is, what is the area to be desegregated? The answer is Wilmington, because Plaintiffs, certain Black children in Wilmington, as well as the Wilmington School Board, have complained that Black children are deprived of equal rights under the rationale of *Brown II, supra*. It is a realignment of the proportion of Whites to Blacks in Wilmington which is prayed for, not that of the surrounding districts which have committed

* These numbers are calculated by seeking a 3:1 Black to White, student ratio. The present Black student population of the Wilmington schools is 11,733 and the present White student population is 1,360. Thus, in order to achieve a 3:1 ratio, the Black student population of the Wilmington schools must be reduced to 9,819. This would require busing 1,914 Black students out of Wilmington and replacing them with an equal number of White suburban students. For ease of discussion, I have rounded the figure up to 2,000.

no act which led to the heavy imbalance of Blacks to Whites in Wilmington. The surrounding districts, or some of them, of sheer necessity will have to receive certain numbers of Blacks from, and bus certain of their White children into, Wilmington. But this is for the purpose of desegregating Wilmington, which is the sole issue before this Court.

If, then, we can proceed under the premise (1) that it is Wilmington which must be desegregated and (2) that some 4,000 students must be bused in order to accomplish this purpose, then the State Board could be directed to prepare a plan requiring the exchange of some 2,000 Blacks from Wilmington with an equal number of Whites from suburban school districts. The attendance areas in Wilmington and the suburban districts which would be selected for this interchange would be left to the State Board, the expertise of which much better qualifies it to devise such a plan than a Court.*

* There is nothing inflexible about the drawing up of a plan provided an acceptable racial mix is maintained both in students as well as faculty, staff and personnel. For instance, and purely as a suggestion, Wilmington could be divided into 4 Zones: A, B, C and D; each zone would be attached to its immediately contiguous school district in the County so that 4 exchange areas would be created: Zone A—Mount Pleasant; Zone B—Alfred I. duPont; Zone C—Alexis I. duPont; Zone D—Conrad. Thus, adapting the school population ratio of the 4 districts to each other (for instance, Alfred I. is 5 times larger than Alexis I), then Mount Pleasant and Zone A would exchange about 300 Whites and Blacks; Alfred I. with Zone B about 1,000; Alexis I. with Zone C about 300; and Conrad with Zone D about 400. On the other hand, the State Board might deem it wiser to spread the burden more equally among a greater number of districts. Moreover, constant experimentation could be carried on. One of the great oppositions to Court-ordered busing is that it tends to destroy the neighborhood school concept. In order to preserve this concept as much as possible, a different 4,000 Whites and Blacks might be bused each year. Nor is it essential to adopt as a basis for this alternative proposal a 3 Black to 1 White ratio. A $2\frac{1}{2}$ Black, or 2, Black, to 1 White ratio might be established. This would, of course, increase the number of children to be bused to 5,000 or 6,000.

If a plan somewhat like the above were adopted, I think it only fair that the State pay all the costs, capital or otherwise, upon the theory that it created the constitutional violation which must be remedied.

This proposal contains, I think, the bare bones of a plan which when fleshed out by experts of the State Board should meet constitutional demands. And in developing such a plan, the State Board should bear the element of cost closely in mind.*

As heretofore stated, I am bound by the authorities to concur with the majority that a plan for the interdistrict busing of students must be ordered. I have merely tried to demonstrate that there is a reasonable alternative, and there may be many alternatives, to the majority plan. The outline here proposed, incomplete as it may appear, would (1) preserve all existing school districts, (2) leave their outstanding bond issues undisturbed, (3) reduce the number of children bused and (4) do away with the necessity of "leveling up" teachers' salaries which, if done, will involve enormous expense. This alternative proposal is far from perfect. No plan will please more than a minority of concerned citizens. Busing 4,000 or 5,000 students will be costly but far less so, I think, than busing a minimum of 15 or more thousand under the majority plan.*

For the reasons expressed, I concur in part and dissent in part.

/s/ CALEB M. WRIGHT,

Senior District Court Judge.

* It may be argued that cost is irrelevant where constitutional rights are concerned. However, cost is not irrelevant in comparing several plans, any one of which is designed to cure the constitutional violation involved.

* The thing that disturbs me most about the majority plan is that it departs so sharply from the past that, with respect to numbers of students to be bused and the cost, neither the citizens of this County, the State Board of Education nor the Court itself know quite where we are heading.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the District of Delaware

BRENDA EVANS, et al.,

Plaintiffs,

vs.

MADLINE BUCHANAN, et al.,

Defendants.

Civil Action
Nos. 1816-1822

JUDGMENT

This 15th day of June, 1976, for the reasons stated in the Opinion of the Court issued May 19, 1976.

IT IS HEREBY ORDERED AND DECREED:

1. (a) That this action shall be maintained as a class action, and the class shall consist of all black and Hispanic children presently enrolled in the Wilmington, Delaware School system, and that the representation of the Intervening Plaintiffs Pacheco, Rodriguez, et al., is limited to the protection of the interests of the Hispanic students who are members of the class, in receiving bilingual education;

(b) That the class so defined shall be represented by the named plaintiffs before the Court who are members of the class, through their parents, legal guardians, or next friends;

2. That the school in that area of Delaware north of the northern line of the Appoquinimink School District; that is, the area presently comprised of the Alfred I. DuPont, Alexis I. DuPont, Claymont, Conrad, DeLaWarr, Marshallton-McKean, Mount Pleasant, Newark, New Castle-Gunning Bedford, Stanton, and Wilmington School Districts, shall be desegregated

in accordance with the Opinions of this Court, and shall be recognized into a new or such other new districts as shall comply with the Opinion of this Court issued on May 19, 1976;

3. The State Board of Education shall:

(a) Appoint a board of five members (the "New Board") to oversee the operation of the schools of the area as defined in ¶ 2 of this Order, such members to be appointed so that one member of the New Board shall be a member of the present Newark School Board; one member of the New Board shall be a member of the present Wilmington School Board; one member of the New Board shall be a member of either the present New Castle-Gunning Bedford, or DeLaWarr or Conrad School Boards; one member of the New Board shall be a member of the present Stanton, Marshallton-McKean, or Alexis I. DuPont School Boards; and one member of the New Board shall be a member of either the present Alfred I. DuPont, Mount Pleasant or Claymont School Boards; and that the members of the New Board so appointed shall serve until their successors are selected and duly qualified;

b. Cooperate and assist the New Board in all planning and operational phases of the implementation of a plan which shall be designed to desegregate the schools in accordance with the Opinion of the Court issued May 19, 1976;

(c) Exercise appropriate supervision of the New Board or its successor or successors and its exercise of authority;

(d) Set a date certain for the transfer of full responsibility for the operation of the schools to the New Board or such successor or successors designated by state law; such date to be prior to September 1, 1977;

(e) Be responsible, together with the presently existing boards, for any expenses created by the operation of the New Board or its successor or successors until such time as the New Board or its successor or successors, in a transfer of authority, receive taxing power, in accordance with ¶ 3(d) hereof, and state law;

4. The New Board or its successor or successors shall:
 - (a) Commence immediately upon appointment to consider any necessary planning for the transfer to it of operating authority;
 - (b) Prepare a plan for the operation of unitary desegregated schools, in accordance with the Opinion of May 19, 1976;
 - (c) Accept responsibility for the operation of the schools, beginning with the Fall, 1977 term, in accordance with a timetable to be set by the State Board of Education;
5. The existing boards of the present school districts shall assist in the transfer of authority, and shall be liable together with the State Board for the expenses of the New Board or its successor or successors, until such time as the New Board or its successors receive taxing authority, in accordance with ¶ 3(d) hereof, and state law; the aforesaid expenses of the New Board shall be borne by the existing boards of the present school districts and by the State Board; each existing board's contribution being assessed in proportion to the ratio which the assessed value of taxable property in that present school district bears to the total assessed value of taxable property in all districts; provided, however, that each existing board's contribution shall be reduced from the aforesaid sum by virtue of the State Board's required contribution, which contribution shall equal the largest contribution required from any of the local boards.
6. The State Board, in cooperation with the existing local districts, may assign members of the professional staff of the Department of Public Instruction or the local districts, to assist the New Board during the period prior to September, 1977;
7. Upon the transfer of full authority to the New Board or its successors, the present boards shall, in accordance with state law, cease to exist;

8. The provisions of Paragraphs 1 through 7 of this Order in accordance with the Opinion of May 19, 1976, shall be inapplicable to the New Castle County Vocational-Technical School District.
 9. The application of the plaintiff class for an injunction to restrain the payment by the State of any subsidy for the transportation of students to private schools is denied;
 10. The provisions of Paragraphs 2 and 7 of this Order shall be stayed in accordance with the Opinion of May 19, 1976; and
 11. The three-judge panel convened for the purpose of considering the above matters is dissolved, and supervisory jurisdiction will remain in the District Court, in accordance with the provisions of the Opinion of May 19, 1976, and the mandate of the Court of Appeals for the Third Circuit in *Evans v. Ennis*, 281 F. 2d 385, 391 n. 1 (1960).
- /s/ JOHN J. GIBBONS,
John J. Gibbons,
United States Circuit Judge.
- /s/ CALEB M. WRIGHT,
Caleb M. Wright,
United States District Judge.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
In and for the District of Delaware

BRENDA EVANS, et al.,

Plaintiffs,

vs.

MADELINE BUCHANAN, et al.,

Defendants.

Civil Action
Nos. 1816-1822.

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES.**

Notice is hereby given that Defendant, State Board of Education, a Defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from the Final Order against the Defendant entered in this action on June 15, 1976.

This appeal is taken pursuant to 28 U. S. C. § 1253.

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Nos. 76-416, 474, 475, 499, 500, 501

Supreme Court, U. S.
FILED

NOV 10 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

**DELAWARE STATE BOARD OF EDUCATION, ET AL.,
APPELLANTS**

v.

**BRENDA EVANS, ET AL.,
APPELLEES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1976

 Nos. 76-416, 474, 475, 499, 500, 501

 DELAWARE STATE BOARD OF EDUCATION, ET AL.,
 APPELLANTS

v.

 BRENDA EVANS, ET AL.,
 APPELLEES

 ON APPEAL FROM THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16(c), Appellees move the Court to affirm the Judgment of the United States District Court for the District of Delaware entered on June 15, 1976, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The May 19, 1976, Opinion and June 15, 1976, Interim Remedy Judgment of the United States District Court for the District of Delaware are not yet reported. They are set out in Appendix A and Appendix B of the Jurisdictional Statement of Appellants State Board, et al. The prior inter-district violation Ruling and Judgment of the District Court are reported at 393 F. Supp. 428 (D. Del., 1975), aff'd 423 U.S. 963 (1975).*

QUESTION PRESENTED

Is any issue warranting further argument presented by the District Court's action in ordering that effective steps be taken to devise and to implement a remedy commensurate with the inter-district violation previously adjudicated?

STATEMENT

A. Introduction

The major grievance of all of the Appellants with the decision of the court below is its determination that an inter-district violation had occurred which necessitated consideration of an interdistrict school desegregation remedy.¹ As we demonstrate on p. 22 *infra*, the existence of an inter-district violation has already been settled because it was previously decided by the court below, 393 F. Supp. 428, and affirmed by this court, 423 U.S. 963.²

* References to the Interim Remedy Ruling will be to the Appendix in State Appellants' Jurisdictional Statement in the form, for example, of A. 21. Citations to the other opinions and orders in this cause will be in the form, for example, of 393 F. Supp. at 430.

¹ See, e.g., Jurisdictional Statement of the State Board, pp. 9-15.

² See also Memorandum of the United States, p. 1, n.1.

Accordingly, the only issue properly presented to this court now is whether the court below abused its discretion in the character of the relief it ordered. This far narrower question forms only a small part of Appellants' contentions, and indeed some of the Appellants apparently wish *only* to relitigate the violation issue, making no claim that the District Court otherwise exceeded its remedial authority.³

Notwithstanding the narrow compass of the legal issues remaining in this long-running suit, we believe it useful to describe in some detail the nature of the violations found by the court below because Appellants have mischaracterized and distorted them and because a clear understanding of this history demonstrates that the District Court did not exceed its authority in determining the appropriate scope of relief.

B. Prior Proceedings

This is simply the latest phase of a law suit begun in 1957. "Its object was to eliminate *de jure* segregation in Delaware schools" 393 F.Supp. at 430, and "to effectuate a transition to a racially nondiscriminatory school system" as required by *Brown II*, 349 U.S. 294, 300-301 (1955). Without rehearsing all of the prior proceedings it is pertinent to note that the original *de jure* segregation in New Castle County has never been remedied. Although a plan for desegregation of Delaware public schools was accepted in 1961, the court approved the plan "only to the extent that it [would prove] effective," 379 F.Supp. 1218, 1223, and retained

³ See the joint Jurisdictional Statement filed by the Mount Pleasant, Alfred I. DuPont, Alexis I. Dupont on Conrad Area School Districts.

jurisdiction, 195 F. Supp. 321, 325. As the court subsequently found, the plan did not prove effective in New Castle County. 379 F. Supp. at 1223 and 1228-30; 393 F. Supp. at 433, 437-8; A. 1-2, 14 n. 43, 16 n. 50, 39.

It is also pertinent that the State and other inter-district violations that provide the basis for the relief now under consideration did not arise only in the later phases of this litigation, but were rooted in circumstances existing at the time of *Brown*. As the court below found, local school districts in Delaware were then "not meaningfully 'separate and autonomous,'" 393 F. Supp. at 437. Rather they were subordinate to the State system of segregation and their boundaries were dual and overlapping, permeable, or disregarded for the purpose of imposing racially segregated schooling. Specifically at the time of *Brown* "*de jure* segregation in New Castle County was a cooperative venture involving both city [i.e., Wilmington] and suburbs." *Id.* Because of such circumstances, the District Court's 1961 decree ordered the State Board to submit a revised school code to the legislature, including a reorganization of the "crazy quilt pattern of [school] districts and laws governing education", as part of the plan for desegregation of the Delaware Public Schools. 195 F. Supp. at 325.

Although the State Board recommended a new school code and redistricting to the General Assembly, they were not enacted. When the legislature finally responded in 1968 with the Educational Advancement Act, it explicitly excluded the Wilmington school district from the discretion vested in the State Board to reorganize all districts throughout the State, expressly legislating

that the boundaries for this "reorganized school district" "shall be the City of Wilmington with the territory within its limits." 14 Del. C. 1004(c)(2) and (4), 1005. The State Board did not submit the Act and reorganization to the District Court for review.

In 1971, Plaintiffs by Amended Complaint petitioned the District Court for supplemental relief; challenged the constitutionality of the 1968 Act and redistricting; and requested that the continuing inter-district segregation in New Castle County be finally and effectively dismantled.⁴ A 3-Judge Court was convened pursuant to 22 U.S.C. 2281. Following a lengthy evidentiary hearing, briefing, and argument, the District Court on July 12, 1974, found continuing *de jure* violations within Wilmington, but reserved ruling on the constitutionality of the 1968 Act and redistricting and other claims of inter-district segregation. 379 F. Supp. at 1223-4.⁵

⁴ The Wilmington school district intervened as a Party Plaintiff and joined in the Petition and Amended Complaint. The State Board Appellants' statement (Jurisdictional Statement, p. 5) that the basis for the inter-district "complaint" here was solely (or even primarily) the change in Wilmington's student population from 31.6% black in 1956 to 82.7% black in 1973 is unfounded. The Plaintiffs' initial Petition for Supplemental Relief, the District Court's inter-district violation ruling, and the District Court's Interim Remedy Judgment were expressly based on the fact that the continuing and increasing disparity in pupil enrollments between Wilmington and suburban New Castle County school districts was *substantially caused* by the purposefully racially discriminatory acts of the State and its subdivisions. See, e.g., 393 F. Supp. at 437-438, 445; A.11-14, 17-19, 39-41.

⁵ In a separate opinion, Circuit Judge Gibbons reached the issues reserved by the majority. Judge Gibbons held the 1968 Act and redistricting unconstitutional and found that the historic inter-district *de jure* segregation in New Castle County had not been eliminated. 379 F. Supp. at 1223-1233.

Two weeks later, on July 25, 1974, this Court issued its opinions in *Milliken v. Bradley*, 418 U.S. 717. Thereupon, the District Court invited the reorganized school districts of New Castle County to intervene and to present evidence on all issues raised by Plaintiffs' 1971 Petition for Supplemental Relief and Amended Complaint. Virtually all suburban school districts intervened as parties defendant; they elected to adopt the State Board pleadings and to stand on the evidence already of record. Briefing on all inter-district segregation issues and the impact of *Milliken* followed. On March 27, 1975, the District Court, District Judge Layton dissenting, issued its Opinion. Applying the *Milliken* legal standards to the evidence adduced, the District Court found significant inter-district, *de jure* segregation throughout New Castle County. 393 F. Supp. at 431-2, 438, 445, 447. The District Court directed the parties to submit alternative inter- and intra-district desegregation plans. 393 F. Supp. at 447.

Pursuant to 28 U.S.C. 1253, the State Board appealed the inter-district Violation Judgment and Order to this Court. In its Jurisdictional Statement, the Appellant State Board argued that the findings of a substantial inter-district segregation violation were incorrect and that the order to come forward with inter-district desegregation plans was therefore unsupported. This Court summarily affirmed, Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting, on the grounds that the appeal did not lie under 28 U.S.C. 1253 within the Supreme Court's jurisdiction. 423 U.S. 963 (1975).

Thereafter, in August, 1975, the parties submitted desegregation plans to the District Court for consideration. Following three weeks of evidentiary hear-

ings, briefing, and argument, the District Court, Judge Layton dissenting in part, issued its interim remedy ruling on May 19, 1976, and its Interim Remedy Order on June 15, 1976. The District Court, Judge Layton concurring, held that all intra-district plans limited to Wilmington proper were wholly inadequate to remedy the inter-district segregation violation in New Castle County previously found. A. 17-19, A. 61-64. After carefully evaluating the various inter-district plans submitted, the District Court established an interim framework for developing an effective remedy should the proper State and local authorities fail to meet their continuing obligation to effectively remedy the inter-district segregation violation. A. 33-47.⁶

Pursuant to 28 U.S.C. 1253, the various defendants now appeal from this Interim Remedy Ruling and Order to this Court, and Plaintiffs file this Motion to Affirm.

C. The Nature and Extent of the Inter-District Segregation Violation Previously Found by the District Court

Based on the application of the *Milliken* legal standards to the record evidence, the District Court found a continuing inter-district segregation violation in New Castle County. 393 F. Supp. at 447. The *de jure* nature and broad extent of this inter-district violation were detailed in the District Court's previous findings and may be summarized as follows:

1. At the time of *Brown*, and for some time thereafter, "*de jure* segregation in New Castle County was

⁶ Judge Layton, dissenting from the particular interim remedy ordered, favored judicial development and implementation of a mandatory inter-district transfer program. A.61 *et seq.*

a cooperative venture involving both [Wilmington] city and suburbs. . . . [A]t that time, a desegregation decree could properly have considered city and suburbs together for the purpose of remedy. At that time, in other words, Wilmington and suburban districts were not meaningfully 'separate and autonomous.' " 393 F. Supp. at 437. This ultimate finding was based on subsidiary findings of fact that local school districts were then subordinate and their boundaries dual or overlapping or simply breached in order to implement the basically monolithic Delaware system of school segregation, with one state system of schooling for blacks and another for whites. Although the specifics of this unique state dual system of schooling varied somewhat from place to place and time to time, 393 F. Supp. at 433, it was in the District Court's words unmistakably "an historic arrangement for inter-district segregation within New Castle County." 393 F. Supp. at 447.

2. Over the next two decades, during a period of great population growth and demographic change in

⁷ Thus, for example, the State-mandated and State-financed black elementary, junior, and senior high schools located within Wilmington long served substantial numbers of black children residing throughout New Castle County, indeed throughout the State. 393 F. Supp. at 433. Likewise, *de jure* white schools located within Wilmington long served substantial numbers of white children residing throughout New Castle County. *Id.* See also, 379 F. Supp. at 123 (Circuit Judge Gibbons, separate opinion). In the face of these findings, Appellants' claims that the effective boundaries of the Wilmington School District have been tied to the city limits since 1905 and that school districts in New Castle County have long been separate and autonomous are not factual. (See, e.g., Jurisdictional Statement of New Castle—Gunning Bedford School District at pages 4 and 11).

New Castle County,⁸ the District Court found "significant governmental involvement in inter-district discrimination." 393 F. Supp. at 447. This involvement not only made the dismantling of the historic inter-district segregation of New Castle County much more difficult, 393 F. Supp. at 432-3 (Cf., *Swann*, 402 U.S. at 14), but it was also found by the District Court to be an independent constitutional violation under *Milliken*, significantly contributing to the marked inter-district segregation flourishing in New Castle County schools. 393 F. Supp. at 438. These ultimate findings were based on several subsidiary findings of fact.

First, the "withdrawal" of suburban children some time after *Brown* from Wilmington schools "reduced, to an extent, the proportionate white enrollment" of the Wilmington schools. 393 F. Supp. at 434 n.8.⁹ Second, pervasive racial discrimination in the suburbs, not present to the same degree in the city, in the sale or rental of private housing—sanctioned, supported, and backed by a long history of numerous and specific public actions (federal, state, and local)—excluded black families from new housing opportunities in the

⁸ During the period from 1954 to 1973, the public school enrollment of suburban New Castle County expanded from 21,543 children (of whom 4% were black) to 73,008 (of whom 6% were black). This large suburban population growth corresponded with the growth of more identifiably black schools in Wilmington, which changed during this period from 12,875 pupils (28% black) to 14,688 pupils (83% black).

⁹ As an independent violation, the District Court "did not find this 'withdrawal' of students to be significant inter-district segregation under *Milliken*." 393 F. Supp. at 434 n. 8. It was, however, a further step in the continuing separation of the races in New Castle County. 393 F. Supp. at 433, 437-8; 379 F. Supp. at 1228-1230 (Circuit Judge Gibbons, separate opinion); A.14 n. 43, 39.

suburbs and thereby excluded them from the burgeoning suburban schools and funneled them into Wilmington. 393 F. Supp. at 434-5. Third, state public housing authorities, acting pursuant to discriminatory policies and practices, concentrated increasing numbers of black families within Wilmington and its schools to the exclusion of suburban public housing and schools. 393 F. Supp. at 435.¹⁰

Fourth, the Wilmington Board, with the sanction of the State Board, maintained five pre-*Brown* "colored" schools as virtually all-black schools and implemented discriminatory policies (e.g., optional zones) to define additional schools as *de jure* black which "may have encouraged white families to move out and discouraged white families from moving in [to Wilmington]," 393 F. Supp. at 436. See also 379 F. Supp. at 1223.¹¹ Fifth, since 1968, the State subsidized the transfer of

¹⁰ In dealing with this public housing discrimination, and with the private housing discrimination supported by governmental racial discrimination, the District Court examined their impact on inter-district population movements and their interrelationship with the continuing interdistrict school segregation. 393 F. Supp. at 434-8. The District Court found that such governmental discrimination had substantial inter-district effects and significantly contributed over a twenty-year period to the increasing concentration of blacks in Wilmington and the decline in the percentage of black residents living in the suburbs at a time when the total suburban population increased fivefold. 393 F. Supp. at 438.

¹¹ Thus were the Wilmington schools "earmarked" as the "black schools" to all who cared to see throughout New Castle County. Cf., *Keyes v. School District No. 1*, 413 U.S. 189, 202 (1973). As the District Court noted, "[R]ealtors testified that sales in the housing market are tied to the [racial] characteristics of the schools in the neighborhood: 'The first thing you teach yourself is know your school district because you sell houses in New Castle County based on school districts.'" 393 F. Supp. at 437. Cf. *Swann*, 402 U.S. at 20-21.

substantial numbers of white Wilmington children to private schools in the suburbs. This, too, "has undoubtedly served to augment the racial disparity between Wilmington and suburban public school populations." 393 F. Supp. at 437. Finally, the vestiges of the historic inter-district system of public school segregation—the pre-*Brown* black schools within Wilmington and pre-*Brown* white schools in the suburbs, as well as their broader, reciprocal and continuing effects on near-by schools—were never eliminated but rather persist. 379 F. Supp. at 1223; 379 F. Supp. at 1228-30 (Circuit Judge Gibbons' separate opinion); 393 F. Supp. at 433, 437-8, 442; A. 1-2, 14 n.43, 16 n.50, 39.¹²

In sum, during the twenty-year period after *Brown* of both marked demographic changes and growing independence in the operation of Wilmington and suburban schools, 393 F. Supp. at 432-3 and 437-8, the Court found that the historic, county-wide arrangement for inter-district segregation far from being

¹² Thus the claim by Appellants that the suburban school districts were found to be "unitary" (see e.g., State Board Appellants' Jurisdictional Statement at page 6) is false when viewed in the inter-district context appropriate under *Milliken*. What the District Court did find with respect to the suburban districts is that when each was viewed in isolation in their respective intra-district contexts, there was "no evidence in the record which indicates that [they] are presently operating other than unitary schools for the children residing in their districts" [*emphasis added*]. 393 F. Supp. at 437 n. 19. However, wholly independent of the unconstitutional 1968 Act and state-wide reorganization which made each suburban school district defendant here a "re-organized district", the District Court made clear that its finding of an inter-district segregation violation extended throughout New Castle County and included every school district. See, 393 F. Supp. at 433-438; A. 11, 13-14 and n. 43.

effectively dismantled was continued and even significantly exacerbated by this variety of racially discriminatory governmental conduct. Applying the *Milliken* standards, the District Court concluded that these inter-district segregation practices "are responsible to a significant degree" for the marked racial disparity between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 438.

3. It was against this background of continuing inter-district segregation that the District Court found that the Educational Advancement Act and state-wide reorganization of school districts in 1968 "contributed to the separation of the races by . . . drawing or re-drawing of school district lines" (Cf., *Milliken*, 418 U.S. at 755, Stewart, J., concurring), thereby further isolating Wilmington's basically black schools from its suburban and virtually all-white counterparts by discriminatory state action. 393 F. Supp. at 445-6. The District Court based this declaration of unconstitutionality on a careful analysis of the specific provisions and operation of the Act, as well as their historical context, immediate objective, ultimate effect, purported justifications, and the alternatives proposed and studied. 393 F. Supp. at 438-446. The District Court found:

School district reorganization pursuant to the Educational Advancement Act amounted to an educational redistricting. Invidious discrimination in such redistricting is perforce an "inter-district violation." The Educational Advancement Act "redrew" the Wilmington school district lines by removing the existing Wilmington boundaries from the State Board's discretion at the same time that other school districts in Delaware were eligible for consolidation Here,

the racially discriminatory exclusion of Wilmington prevented the State Board from considering whether sound educational principles dictated a consolidation of Wilmington with other school districts. But for this racial classification, the [State] Board may have consolidated Wilmington [or various parts thereof] with other New Castle County districts, with the result that the racial proportions of the districts would have been altered significantly . . . [T]he reorganization provisions played a significant part in maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts.

393 F. Supp. at 445-6 and n.36.¹³ This inter-district school district boundary violation thereby affected all

¹³ Given the prior history and continuing inter-district segregation and the outstanding 1961 District Court order to reorganize school districts state-wide to eliminate all vestiges of the historic state system of inter-district segregation, the District Court's evaluation of the 1968 Act and reorganization may be viewed as pursuant to *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972) and *United States v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972). E.g., 379 F. Supp. at 1225 et seq. (separate opinion of Circuit Judge Gibbons); 393 F. Supp. at 445; A.18. Under this remedial test, although the District Court found no dominant racial motive in the General Assembly (393 F. Supp. at 445, A.55), the court quite properly held that the 1968 Act and reorganization not only perpetuated but cemented the prior and continuing *de jure* violation of inter-district segregation between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 445. However, the District Court also found the 1968 Act and reorganization an "independent constitutional violation." 393 F. Supp. at 438-446. In this context, it is clear that the District Court's determination that the provisions excluding the Wilmington District "were [not] purposefully racially discriminatory" refers to the dominant, subjective motivation of the General Assembly and individual legislators. 393 F. Supp. at 439; A.55. The District Court examined a number of legitimate or rational reasons for the state-wide reorganization of school districts wholly apart from racial concerns and desegre-

of New Castle County and further implicated every New Castle County school district in the continuing inter-district segregation.

Based on these three cumulative violations, the District Court found a substantial inter-district segregation violation significantly contributing to the marked racial disparity between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 438, 445. See also, A. 11-14.

D. The Scope of the Interim Remedy Ordered by the District Court

1. In its interim remedy ruling, the District Court analyzed the legal standards in *Milliken* and *Swann* which establish the proper scope for the exercise of equitable discretion to order a remedy for the inter-district segregation violation found in New Castle County.¹⁴ A. 9-15. In particular the District Court, in

gation considerations. 393 F. Supp. at 439. But the District Court found that the legislature fully appreciated the inter-district segregative effect of its action. 393 F. Supp. at 439; also A.55. And, after analyzing the 1968 Act and reorganization in its total context under all the circumstances, the District Court found that it amounted to "unjustified" or "invidious" "racial discrimination." 393 F. Supp. at 445-6 and n. 36. Cf. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967). (In later evaluating the 1968 Act and reorganization under the "purpose" language of 20 USC 1715 and 1756, the District Court held that it had found the requisite racially discriminatory "purpose" in the 1968 Act and reorganization contemplated by Congress. A.55).

¹⁴ The District Court focused primarily on the northern New Castle County area. This area comprises 251 square miles with twelve school districts (reorganized in 1968 from nineteen) and 80,678 public school students, 19.4% of whom are black. Wilmington Public Schools are 84.7% black, while ten of the eleven suburban school districts are more than 90% white. A. 4-5 and n. 9.

adhering scrupulously to the teachings of *Milliken* and *Swann*, held that the nature and extent of the inter-district violation determine the proper scope of any inter-district remedy (A. 10-11); that an inter-district violation must be substantial, not de minimis, and proximately related to the disparity in racial enrollments between districts to require an inter-district remedy (A. 10-11); and that the relief ordered must place the victims of the violation in substantially the position they would have occupied in the absence of the violation by insuring that a racially non-discriminatory system of public schools replaces the basically dual system (A. 14).¹⁵ Under these standards the District Court again weighed the nature and extent of the cumulative inter-district violations and their effect on the racial disparity in enrollments between Wilmington and the other school districts of northern New Castle County. Amplifying its prior inter-district violation judgment, the District Court again found that the inter-district violations "had a substantial, not a de minimis effect on the enrollment patterns of the separate districts." A. 11. Recognizing that a variety of other factors may "also [have] contributed to a degree" to this inter-district school segregation, the District Court found that the racially discriminatory acts of the State and its subdivisions were "a substantial and proximate cause of the existing disparity in racial enrollments in northern New Castle County." ¹⁶ A. 12.

¹⁵ Given the process followed and standards applied by the District Court, it is difficult to determine what more the Solicitor General (Memorandum pp. 8-9) would have any higher court tell the District Court to do. See Discussion *infra*, pages 28-32.

¹⁶ The Solicitor General apparently agrees with these findings since he states, "[i]n our view, these . . . significant and continuing inter-district acts of racial discrimination . . . would require

2. The District Court therefore rejected all plans limiting the remedy to the confines of Wilmington proper because such intra-district plans merely perpetuated rather than remedied the inter-district segregation violation. A. 18-19.

3. The District Court then considered the variety of inter-district plans which had been submitted by the parties. With respect to the various voluntary transfer plans and other "magnet" approaches, the District Court found their use "as the sole means of system-wide desegregation . . . decidedly unpromising." A. 23.

The various "cluster and center plans" proposed mandatory pupil reassignments between the existing Wilmington and suburban New Castle school districts to eliminate the inter-district segregation. Such inter-district assignment plans would effectively remedy the inter-district segregation and were manageable within existing state law provisions. A. 25. However, the District Court found that such plans in assigning pupils across district lines would be difficult to administer and fraught with potential educational and administrative

a significant inter-district remedy." Memorandum p. 9. [In response to the suburban districts' misreading of the District Court's prior inter-district violation opinion and of *Milliken* on the issue of suburban "innocence or guilt" the District Court noted several points. First, the suburban districts, all reorganized in 1968 pursuant to the Education Advancement Act, are the product of one of the inter-district violations and therefore part of the violation itself. A.12-14, 18. Second, under *Milliken*, 418 U.S. at 745, constitutional violations by others which cause inter-district segregation between districts, as here, permit inter-district relief against affected (albeit "innocent") school districts. A.12-13. Third, each of the reorganized suburban districts, and their predecessors, were actively involved in the inter-district violations wholly independent of other racially discriminatory State actions and their inter-district effects. A.13-14 and n. 42.

disputes between the districts which might call for continuing judicial supervision. A. 25-26. The District Court held:

Where methods are available which will accomplish [an effective remedy] without the associated problems, the Court, as a matter of equitable discretion, should follow that course which will require its intervention in the least possible degree which will insure compliance. See generally, *Milliken*, 418 U.S. 740-45; *Gautreaux*, 44 U.S.L.W. 4483-85.

A. 26. In the exercise of its discretion, the District Court therefore declined to order inter-district "cluster and center plans." ¹⁷ A. 27.

With respect to the various proposals to "redistrict" (or subdivide) ¹⁸ or to consolidate New Castle County schools, the District Court held "that the power of the Court to order a reorganization would not appear to be in doubt," given the nature and extent of the inter-district violation, particularly where one of the violations found was the unconstitutional reorganization in 1968 which resulted in the very school districts before the Court as parties. A. 30-31. Although the redistricting proposals could be implemented pursuant to existing state law provisions, the District Court found that the State Board had failed to present "specific criteria" by

¹⁷ As the Court found, "redrawing of attendance lines and other shifts in present patterns of attendance will undoubtedly be required to desegregate. But such plans are better drawn where control is in the hands of local leaders acting in accordance with constitutional limitations." A.27.

¹⁸ For example, the State Board proposed a redistricting plan creating five new districts, each with one or more of the existing districts and one-fifth of Wilmington. A.28.

which to demonstrate where "present districts should be cut" and "during testimony . . . admitted that, in light of more recent figures, it would probably recommend somewhat different lines be drawn." A. 32. In view of the State Board's failure to present "specific criteria" for redistricting, the District Court determined that *any* redistricting "ought to be dealt with explicitly by State education officials" (A. 32):

Absent such criteria, we feel that the more proper course is to create a situation which will not freeze the district lines by court order, but will create a framework within which the State can make a future determination of proper districts for the area, while insuring that actual desegregation will take place [in the interim].

A. 32. See also A. 36-37.

4. The District Court, therefore, set up a procedure whereby state officials would be given an opportunity in the first instance to develop an effective reorganization plan. The court made no "final determination of the organization of the area and of the lines to be followed in setting up such an area . . ." A. 33. Citing *Milliken*, 418 U.S. at 741-742 and *Hills v. Gautreaux*, 425 U.S. 284 (1976), 44 U.S.L.W. 4483-84, the court noted that "[s]uch decisions are far better left to legislators and the process of compromise than to the rigors of judicial determination. 418 U.S. at 744." A. 34. The Court went on to say "[d]eterminations of methods of governance, and the day-to-day operations of the schools will be left in the hands of appropriate local officials. This Court should have no need to interfere in those decisions, unless they violate federal law or constitutional provisions." A. 34.

However, to avoid a stalemate and to insure the elimination of the inter-district segregation ~~fund~~, the District Court provided for an interim consolidation and interim board drawn from the local districts to begin planning and to insure implementation should the State fail to take prompt and effective action.¹⁹ A. 33, 44. To allow time for State officials to act with regard to the organizational structure and the Interim Board to plan for necessary pupil assignments, the court stayed portions of its judgment until September, 1977. A. 56-57. If the State has not acted by that time, the standby procedure already underway establishing an interim consolidated Board will become fully effective. A. 33-34, 36-37, 44, 46, 74-75. The court reiterated that this "reorganization . . . is effective only in the absence of proper State action to change it." A. 34.²⁰

5. Exercising its equitable discretion, the District Court limited the school districts in northern New Castle County to be included in further pupil desegregation planning by the Interim Board only to those

¹⁹ This local process is well under way and may lead to a recommendation to the State authorities and to the Court, joined by all districts, that the districts retain their present structure while re-assigning pupils and staff for some interim period.

²⁰ Pursuant to the District Court's invitation, the Delaware legislature has already expanded the Interim Board (responsible for planning and then administering the consolidated school district, subject to the supervision of the State Board) from five to thirteen members. 60 Del. Law C. 492. And the Interim Board, with its "Council of Superintendents" from each of the included school districts, is evaluating the propriety of various redistricting plans for possible recommendation to the State Board and the General Assembly for their consideration.

necessary for continuing and effective relief from the inter-district segregation violation. A. 37-41.²¹

6. For the benefit of the Interim Board and State Board (or any other pupil assignment authority created by the State should it accept the District Court's invitation to act), the District Court established the "starting point" for determining when a school would be viewed "*prima facie*" as 'substantially disproportionate' and thereby require the assigning authority to justify maintenance of such "one-race" schools under *Swann*, 402 U.S. at 26:

A "one race" school for these purposes will be defined as a school whose racial enrollment figures indicate that its population is substantially disparate from the expected range of enrollments in a genuinely non-discriminatory system, allowing for a variation in pupil assignments.

²¹ Applying these criteria, the District Court excluded the school district (Appoquinimink) most distant from Wilmington because, *inter alia*, its inclusion would not have any impact on the overall effectiveness of any inter-district plan and its schools already were substantially integrated relative to the areawide racial composition. A. 38. However, the District Court included Newark, the school district on which there was substantial dispute among the parties, because, *inter alia*, it was necessary to insure that relief from the inter-district segregation would be effective and stable over time; and it was well within reasonable time and distance limitations. A. 39-41. The District Court specifically noted, however, that all pupils and schools in Newark (and other school districts included in further pupil desegregation planning) were not thereby required to be included in the actual plan of pupil reassignment to be developed by the Interim Board: "The issue in assignment of students will be whether the assigning agency in the future meets its burden of showing that the existence of one-race schools is not due to the maintenance of the dual system [of inter-district segregation]. *Swann*, 402 U.S. at 26." A. 41.

A. 42-43. Compare *Swann*, 402 U.S. at 24-26. Taking into consideration all of the factors involved in the case, and using the area-wide racial composition of 19.4% black only as a "starting point" (A. 42), the District Court advised the pupil assigning authority that schools ranging between 10 and 35% black in their enrollments would be considered "*prima facie* desegregated." A. 43. The District Court emphasized, however, that this was only an initial guideline for the local pupil assigning authority (A. 42); and that the object of pupil reassignments by the local authority is to dismantle the segregation caused by the inter-district violations (A. 41, 43). The District Court further advised that deviations would be permissible if justified under *Swann* criteria, but such review obviously would have to await development of the actual pupil assignment plan by the local authority.²² A. 42-44 n. 150.

7. Finally, the District Court evaluated its proposed consolidation plan under the provisions of the Equal Educational Opportunity Act of 1974, 20 U.S.C. 1701, et seq. The District Court "complied fully with the statutory requirements here." A. 53. Of particular relevance, the District Court held that its prior finding on inter-district violations, including the 1968 Act and reorganization, were findings of the racially discriminatory "purpose" and inter-district effect contemplated under 20 U.S.C. 1715 and 1756. A. 55.

²² The Court specifically stated that distant schools, even in this small and compact area, need not be included in the pupil reassignments if the reassigning authority could show that such one-race assignments "were genuinely non-discriminatory." A. 43 n. 148. See also note 21, *supra*. The District Court added that the local school authorities had the discretion to do more, but they were not constitutionally required to do so. A. 43-44.

REASONS WHY THE INTERIM REMEDY JUDGMENT SHOULD BE AFFIRMED

I. Both This Court's Prior Affirmance of the Inter-District Violation Judgment and the Manifest Correctness of the Judgment Foreclose Further Review of Liability Issues.

Appellants' present challenge to the District Court's prior inter-district violation judgment must fail both because it comes too late and because it is insubstantial.

The challenge comes too late because this Court summarily affirmed the inter-district violation judgment on the prior appeal. 423 U.S. 963 (1975). Whatever the precedential meaning of such a summary affirmance for future cases (see, *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974)), it is a decision on the merits dispositive of the inter-district liability issue in *this, the same case*.²³ *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Even if this were not so, the challenge is insubstantial. From the historic arrangement for complete inter-district segregation which survived *Brown* through the 1968 Act and reorganization, which capped a twenty-

²³ Appellants, apparently conceding the dispositive effect on this appeal of a prior decision on the merits by summary affirmance, argue that in reviewing the prior interlocutory relief, "this Court could only consider whether issuance of the injunction constituted an abuse of discretion," citing *Brown v. Chote*, 411 U.S. 452, 457 (1973). See, e.g., Jurisdictional Statement of Appellants State Board, et al., note at page 6. Under *Milliken*, however, it would have been a *clear* abuse of discretion for the District Court to order planning for inter-district desegregation in New Castle County, if there were *not* a substantial inter-district violation. See, *Milliken v. Bradley*, 418 U.S. at 743-747. Thus, under Appellants' reasoning, there can be no question that this Court's prior affirmance in this case represents a decision on the merits, dispositive of the liability issue. See also Memorandum of the United States, p. 1, n. 1.

year history of public racial discrimination contributing substantially to the racial disparity in enrollments between school districts in New Castle County, the evidence showed and the District Court found inter-district violations under *Milliken*. In the Statement *supra*, pp. 8-14, we have summarized the District Court's scrupulous application of the *Milliken* standards to the evidence and the detailed nature of its findings concerning these inter-district violations. The District Court assessed the impact of these inter-district violations on the racial disparity in pupil enrollments between school districts in New Castle County. After weighing all the potential contributing circumstances, the District Court found these constitutional violations "a substantial cause of [the] inter-district segregation," *Milliken v. Bradley*, 418 U.S. at 745, between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 438, 445; A. 11-12. Suffice it to say that these findings, far from being plainly wrong, are supported by substantial evidence. See Statement, *supra*, pp. 8-16.²⁴

²⁴ In the Detroit case, there were *no* lower court findings showing any inter-district violations significantly affecting the racial composition of the school districts in the Detroit area; to the contrary, the lower court findings focused *only* on violations and effects *within* the Detroit School District. *Milliken v. Bradley*, 418 U.S. at 744-751. Similarly, in the Richmond case, racially discriminatory acts were not found to have contributed to the disparity in pupil enrollments between the historically separate and autonomous Richmond, Henrico, and Chesterfield school districts. 462 F.2d at 1065-1066. In contrast, as detailed in the Statement, *supra*, pp. 8-14, the inter-district violation here includes: (1) an historic arrangement for complete inter-district segregation in New Castle County through *Brown* among school districts which were not then meaningfully separate and autonomous; (2) a subsequent twenty-year history of public racial discrimination, including by school authorities, which not only continued but exacerbated "to a significant degree"

Indeed, the Appellant's primary claim seems to be that the District Court erred in including the 1968 Act and reorganization as a part of the cumulative inter-district violation because there was no finding of racially discriminatory purpose. See, e.g., Jurisdictional Statement of Appellants State Board, et al., at pp. 9-13. Wholly apart from the fact that the constitutionality of the 1968 Act and reorganization has already been decided adversely to Appellants on the prior appeal, their claim has no merit.

First, the District Court held that, because of the existence of other purposeful acts of discrimination

the increasing pupil segregation *between* school districts in New Castle County; and (3) an unconstitutional 1968 state-wide school district reorganization which "played a significant part" in "maintaining the racial identifiability of Wilmington and the suburban New Castle County." In passing, we also reiterate that the District Court's violation findings concerning segregative housing practices here were based on governmental rather than private action; were evaluated in the context of the inter-related and inter-locking "school" violations; and assessed the overall impact of this state racial discrimination on the racial disparity in pupil enrollments between Wilmington and the suburban New Castle County districts. See, Statement, *supra*, pp. 10-11 and Notes 10-11. In contrast both the Court of Appeals and this court in *Milliken* explicitly refrained from any consideration of housing evidence, see 418 U.S. at 728 n. 7, 484 F.2d at 242; and the Court of Appeals in Richmond could not conclude from the district court's findings whether any such discrimination had any impact at all on the disparity in pupil enrollments between the Richmond and Henrico and Chesterfield school districts. See, 462 F.2d at 1066.

Thus Appellants' continuing attempt to argue that this case is the same or even similar to the Detroit and Richmond cases disregards the record and findings made below. *Milliken*, far from conflicting with the decision below, fully supports the judgment. The Solicitor General agrees with the District Court's view of the significant nature and substantial extent of the inter-district violation. See Memorandum p. 9; Statement, *supra* n. 16.

that contributed significantly to inter-district segregation, its inter-district violation judgment would stand "independently of the State's actions" with respect to the 1968 Act and reorganization. See, 393 F. Supp. at 438; A. 13-14; and Statement, *supra*, at pp. 8-12. Second, given the prior and continuing invidious inter-district segregation prevailing in New Castle County and the outstanding 1961 order of the District Court to reorganize school districts in Delaware to eliminate the vestiges of the state system for imposing school segregation, the remedial standard of *Emporia and Scotland Neck* was applicable: did the 1968 Act and reorganization maintain (or did it instead effectively dismantle) the prior and continuing inter-district segregation in New Castle County? See, 407 U.S. at 451, 460; 407 U.S. at 489-490.²⁵ There is no question that the 1968 Act and reorganization failed to pass muster under this test. 393 F. Supp. at 445; see also, A. 18 and Statement, *supra* Note 13.

Finally, as set forth in the Statement, *supra*, pp. 12-14, the District Court correctly found the 1968 Act and reorganization an independent constitutional violation after a careful analysis of "the totality of the relevant facts," *Washington v. Davis*, 44 LW 4792. Considering these facts, the District Court found that Plaintiffs had "made out" a "*prima facie*" case of unconstitutional racial discrimination, not just disproportionate racial "impact." *Id.* The District Court therefore shifted "the burden of proof" to the Appellants to justify the 1968 Act and reorganization. *Id.* Finding that on balance the justifications asserted

²⁵ In other words, in these circumstances, "[t]here was thus no need to find 'an independent constitutional violation.'" *Washington v. Davis*, — U.S. —, 45 L.W. 4793.

by the Appellants were insufficient to rebut the *prima facie* case, the District Court concluded that portions of the 1968 Act and reorganization amounted to "invidious discrimination." 393 F. Supp. at 446 n. 36. Thus, it is manifest that the District Court's analysis and judgment of the 1968 Act and reorganization were *not* based or "trigger[ed]" "solely . . . on racially disproportionate impact," *Washington v. Davis*, 44 LW 4792-4. To the contrary, they adhered to the substance of this Court's subsequent opinion in *Washington*.²⁶ See also, 44 LW 4800 (Stevens, J., concurring).

²⁶ Of course, the District Court did not use the phrase "racially discriminatory purpose," speaking of "invidious discrimination" instead. 393 F. Supp. at 446. This semantic difference is, obviously, of no moment. Appellants, however, attempt to make much of the District Court's statement that it could not conclude "that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory." 393 F. Supp. at 439. However, for precisely the same reason, this anomaly is of no moment. For in making that statement, the District Court was referring to the "subjective intent of the decision maker," *Washington v. Davis*, 44 LW 4800 (Stevens, J., concurring), *not* a "purpose" or "intent" of the 1968 Act and reorganization in the *Washington* or *Keyes* sense. See, Statement, *supra*, Note 13. The District Court made clear that its judgment on the 1968 Act and reorganization included a finding of racially discriminatory or segregative "purpose" or "intent" in this sense when applying the provisions of 20 USC 1715 and 1756 to the case. A. 55; Statement, *supra*, Note 13. In other words, as with many state actions, the purposes of the 1968 Act and reorganization were diverse; here, however, one of the purposes was racial discrimination, "maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts." 393 F. Supp. at 495. Compare, e.g., *Keyes v. School District No. 1*, 413 U.S. 189, 210-214 (1973), where this Court noted that a state action "to . . . maintain" segregated schooling is *de jure* if "segregative intent" is "among the factors" that motivated the act in question.

Indeed, the District Court here "quite properly undertook to examine the constitutionality of the [Act] in terms of its 'immediate objective,' its 'ultimate effect,' and its 'historical context and the conditions existing prior to its enactment.'" *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967). Far from foreclosing or departing from this approach which the Court has "frequently undertaken" itself, 387 U.S. at 373, *Washington v. Davis*, affirms the propriety of this longstanding Equal Protection analysis to insure that statutes, neutral on their face, do not in fact invidiously discriminate on the basis of race. 44 LW 4792-4794; and 4800 (Stevens, J., concurring).

In summary, it was "specifically shown" below, and the District Court specifically found, that the "racially discriminatory acts of the state or local school districts . . . have been a substantial cause of inter-district segregation" in New Castle County. *Milliken v. Bradley*, 418 U.S. at 745. Indeed, each of the examples of such inter-district violations given by the Justices in *Milliken* was found by the District Court here.

1. District lines have been drawn to frustrate the "process of dismantling a dual school system," 418 U.S. at 744, "deliberately . . . on the basis of race," 418 U.S. at 745, and so as to contribute to the separation of the races by drawing or redrawing school district lines," 418 U.S. at 755 (Stewart, J., concurring). See, Statement, *supra*, pp. 12-14.
2. There have been other "racially discriminatory acts" by "the state," by "local school districts," and by a "single school district" which have substantially contributed to the present inter-district segregation in New Castle County, 418 U.S. at 745, including, among many other acts, by "transfer of school units between districts," 418 U.S. at 755

(Stewart, J., concurring). See, Statement, *supra*, pp. 8-12.

3. State officials have "contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing . . . laws" between Wilmington and suburban New Castle County school districts, 418 U.S. at 755 (Stewart, J., concurring). See, Statement, *supra*, p. 10.

The District Court's finding that inter-district violations significantly contributed to the racial disparity between Wilmington and suburban New Castle County school districts is in accord with this Court's prior decisions and is manifestly correct.

II. The District Court Did Not Err in Providing for Interim Relief Pursuant To Its Duty To Prescribe Appropriate Remedies for the Inter-District Violation.

Given the propriety of the inter-district violation finding, the only issues ripe and worthy for decision on this appeal are whether the District Court abused its equitable discretion in providing for an inter-district remedy by (a) including a geographic area less than the full extent of the violation; (b) providing for an interim organizational structure, which requires the least possible judicial supervision over continuing local school authority action, to develop and implement an effective remedy; and (c) providing a broad and flexible racial guideline to be used by the local school authority as a starting point in developing the actual plan of non-discriminatory pupil assignments. These issues concern the District Court's exercise of its equitable discretion in supervising the development of an effective inter-district remedy for the inter-district violation found in the peculiarly local circumstances of this case. They present questions so insubstantial

as to require summary affirmance without further argument.

A. There is no abuse of discretion in the District Court's delineation of the geographic scope of the remedy. The court properly determined that all of the districts in New Castle County were implicated in the several inter-district violations committed by the legislature and by state and local officials; and that these violations were a proximate and substantial cause of the inter-district segregation. It then used the familiar criteria of feasibility, time and distance and stability to decide which of the districts implicated in the violation should be involved in the remedy. See *Swann, supra*; Statement, *supra*, Note 21. There is no abuse of judicial authority in the District Court's limitation of the geographic scope of the remedy only to major portions of northern New Castle County, when the inter-district violation included all of New Castle County. See, *Milliken v. Bradley*, 418 U.S. at 744; *Hills v. Gautreaux*, 44 LW 4483-4484.²⁷

B. Appellants parrot the phrase "super-district" (e.g., Jurisdictional Statement of Appellants State Board, et al., at page 20), in challenging the District Court's order creating a single consolidated school authority to plan and to implement the inter-district remedy if the state should fail to take appropriate

²⁷ It is not at all clear how the Solicitor General differs with the District Court's careful application of these judicial principles. The Solicitor fails to state any concrete factor that the court omitted from its consideration that would have enabled it to gauge the impact of the violation with more precision. Lacking this, the government's memorandum appears to be calling upon the District Court to engage in a ritualistic exercise that would allow it to avow with certitude, albeit fictionally, the mathematical impact of the violation.

action. Given the inter-district nature of the violation, however, the District Court had the "duty to prescribe appropriate remedies," *Milliken v. Bradley*, 418 U.S. at 744, i.e., to breach or otherwise restructure the existing school district boundaries in order to implement the necessary inter-district pupil desegregation. See also, *Hills v. Gautreaux*, 44 LW 4483-4484. Three workable approaches to the problem of organizational structure were presented in the various plans: inter-district transfers utilizing existing districts, redistricting or redrawing boundary lines, and consolidation. See Statement, *supra*, pp. 16-19. In these circumstances, no substantial claim of abuse of discretion should arise from the District Court's decision to use any one of the three alternatives available.

Moreover, the District Court's decision to rely in the first instance on consolidation, instead of inter-district transfers or redistricting, came only after a careful evaluation of the burdens and inconveniences of each alternative. See Statement, *supra*, pp. 16-18. Guided by this Court's admonitions in *Milliken* to avoid judicial entanglement in overall policy-making and day-to-day administrative responsibilities insofar as possible, 418 U.S. at 744, the District Court found that under any redistricting or inter-district transfers utilizing existing school districts, it would be required either to make difficult overall policy judgments (A. 32, 36-37) or to resolve day-to-day administrative disputes between school districts. A. 25-27. In contrast, after an initial consolidation (pursuant to existing state law provisions insofar as possible and subject to such reorganization and restructuring as the State may enact), the District Court need not intervene further in the operation of the schools by the local school authority,

i.e., the Interim Board (or other authority named by the State). A. 34.

Thus, the District Court chose the organizational structure—consolidation—requiring the least continuing judicial intervention. The District Court also specifically invited the State to substitute such alternative organization or structure as it may now or at any time hereafter deem fit. A. 33-34, 36-37, 44, 46. And the District Court delayed and staggered implementation over a two-year period both to give the State time to act and to permit cooperation and effective planning by all concerned, including the present local superintendents and school districts and the primary defendant, the State Board. See, Statement, *supra*, pp. 18-19.²⁸ In providing such a framework to implement an inter-district remedy, the District Court acted well within its "duty to prescribe appropriate remedies." *Milliken v. Bradley*, 418 U.S. at 744.

C. Having thus given the responsibility for planning and implementing inter-district remedy to the local Interim Board acting under the supervision of the State Board, the District Court provided a broad and flexible guideline for further planning for the pupil assignments necessary to remedy the unconstitutional, inter-district pupil segregation. Looking to the pupil racial composition of the affected area as a whole (19.4% black), the District Court established a broad "starting point" (10 to 35% black) within which the schools should be considered "*prima facie* desegre-

²⁸ The District Court's time frame for implementation represents the least of Plaintiffs' constitutional entitlement. See, *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Board*, 396 U.S. 226, 290 (1969).

gated" (A. 43), i.e., not "substantially disproportionate." *Swann*, 402 U.S. at 26.

This broad range "starting point" was deliberately made flexible: the District Court, scrupulously adhering to *Swann*, 402 U.S. at 24-26, further advised that schools or sets of schools would be permitted to vary from this broad range upon a showing that such "substantially disproportionate" schools are not necessary to remedy the violation found, are beyond reasonable time and distance limitations, or are otherwise genuinely non-discriminatory. A. 41 and n. 135, 42, 43 and n. 148. See also, Statement, *supra*, Notes 21-22. Hence, the precise nature (and any judicial review of) the actual pupil assignment plan to be implemented "must await the actual assignments by the proper authorities" (i.e., by the Interim Board or such other local school authority as the State shall in the meantime designate). A. 44 n. 150. In these circumstances, Appellants' claim and the Solicitor General's suggestion that the District Court's ruling and judgment on further pupil desegregation planning may mandate forbidden "racial balance" is without substance.²⁹

²⁹ The Solicitor General's discussion (Memorandum, pp. 8-11) of what standards and factors guided the District Court's interim remedy determination does not describe what the District Court said and did. First, unless the Solicitor General is requesting some fictional calibration of the impact of the inter-district violation (see Note 27 *supra*), no trial court could more scrupulously and expressly tailor the remedy to the nature and extent of the inter-district violation. Second, the District Court's basis for including and excluding certain districts from further planning for inter-district desegregation obviously does not relate to requiring a remedy *beyond* the violation; for the District Court utilized relevant, practicality requirements to *limit* the remedy to *less than* the full geographic scope of the violation. Finally, with respect to further planning for pupil reassignments between

III. This Court Has the Jurisdiction to and Should Decide This Appeal Without Further Argument.

All of the foregoing strongly suggests that the appropriate disposition of this appeal is a summary affirmation of the District Court's interim remedy judgment. The Solicitor General, however, proffers two alternative courses of action, neither of which is warranted under the circumstances here.

First, the Solicitor General suggests that the appeal from the District Court's interim remedy judgment lies in the Third Circuit rather than this Court "because the judgment *could have* been entered by a single judge." Memorandum p. 6 [emphasis added]. This statement, however, is not dispositive of where an appeal properly lies when the judgment has in fact been rendered by a three-judge court which has been properly convened. See, e.g., *Philbrook v. Glodgett*, 421 U.S. 707, 712 n. 8 (1975). The Solicitor General concedes (p. 6) that it is settled that here the three-judge Court was properly convened. 423 U.S. 963 (1975).

The question of where an appeal lies from a three-judge court properly convened in the first instance but arguably subject to dissolution thereafter may present

the districts included, the District Court expressly refrained from requiring any particular degree of racial balance in any school or classroom. Rather, the District Court advised the Interim Board to use the over-all racial composition of the area affected by the violation as a starting point and further advised that pupil reassignments were *constitutionally* required only to the extent necessary to remedy the violation pursuant to remedial criteria established by the decisions of this Court. In sum, even the Solicitor General's speculative quibbling over the fine details of what he admits will in any event be "a significant inter-district remedy" is premised on an erroneous reading of what the District Court has done.

interesting academic and conceptual issues.³⁰ But it ought not deter this Court from summary affirmance of the court below for two reasons: (1) no useful purpose is served by referring insubstantial claims to another court and needlessly prolonging already protracted litigation and (2) with the repeal of 22 U.S.C. 1228 for future cases no undesirable policy would be established by a disposition on the merits.³¹

The Solicitor General also suggests (Memorandum, p. 10) that, should this Court grant certiorari to review *Indianapolis*, this case could be joined for full review under Supreme Court Rule 20. That would be appropriate only if the issues presented were both substantial and important. But the issues presented by this appeal do not become substantial by joining them with a case in a wholly different posture. Here, unlike *Indianapolis*, the issue of liability has already been decided by this Court; and on any view of the remedy issues, they are here wholly different and insubstantial compared to those posed by *Indianapolis* where the primary issue is whether any inter-district violation exists at all.

In short, neither Appellants nor the Solicitor General has presented any substantial argument for prolonging this litigation and there is every reason to bring it to a

³⁰ An appropriate view of the interim remedy judgment here is that it remains within the original Congressional grant of direct appellate jurisdiction because it not only continues the injunction against the 1968 State-wide Statute but also necessarily provides further injunctive relief against its operation. See *Hicks v. Miranda*, 422 U.S. 332, 347 (1975).

³¹ See P.L. 94-381. In the waning days of such three-judge courts, we do not think this Court need be detained by defining with technical precision at what point such a court *must* dissolve itself in injunctive proceedings flowing from an initial determination of the unconstitutionality of the state statute.

just and speedy conclusion by affirming without further argument.

CONCLUSION

WHEREFORE, Plaintiffs pray that their Motion to Affirm be granted and that the District Court's Interim Remedy Judgment be affirmed without further argument. The decision below is correct and presents no substantial issue requiring plenary review. The standards set for inter-district relief in *Milliken v. Bradley* were plainly met in the violation findings and have been scrupulously followed in the Interim Remedy Judgment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-416

DELAWARE STATE BOARD OF EDUCATION, ET AL.,
Appellants,

VS.

BRENDA EVANS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF DELAWARE.

**APPELLANTS' MEMORANDUM IN REPLY TO
MOTION TO AFFIRM.**

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1. Appellees' distortion of the facts cannot be corrected in detail in this memorandum. Suffice it to say that Appellants' statement of facts derives from the opinions of the trial court and its accuracy can be checked against those records.

2. Appellees' attempt to distinguish *Milliken v. Bradley*, 418 U. S. 717 (1974), and *Bradley v. School Board of the City of Richmond*, 462 F. 2d 1058 (4th Cir., 1972), *aff'd by equally divided Court*, 412 U. S. 92 (1973), with regard to the so-called "housing violations," again rejects the plain facts. The record of "housing violations" in the trial courts in *Milliken* and in *Richmond* is far more extensive than that in the trial court here. The "housing violations" in those cases were held not to consti-

tute constitutional violations, nor do the facts here warrant such a conclusion.

3. Appellees' attempt to dispose of the primary "constitutional violation." The unconstitutionality of the Educational Advancement Act, in the face of the command of *Washington v. Davis*, 96 S. Ct. 2040 (1976), would ignore the requirement that a constitutional violation must be based on segregatory intent. The clear holding of the court below cannot be evaded: "We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington School District were purposefully racially discriminatory." 393 F. Supp. at 439.

4. The proposition that this Court has already passed on the merits of this case is also without substance. The earlier appeal presented only the question whether the trial court had abused its discretion in ordering the parties to submit both interdistrict and intradistrict plans. "In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion." *Brown v. Chote*, 411 U. S. 452, 457 (1973); cf. *Doran v. Salem Inn, Inc.*, 422 U. S. 922 (1975).

5. Appellees, like Appellants, read the judgment below, as it must be read, to continue the injunction against enforcement of the Educational Advancement Act contained in the interlocutory order.

6. Since Appellants' Jurisdictional Statements were filed, this Court has granted review in *Milliken v. Bradley*, No. 76-447, 45 U. S. L. W. 3363 (15 Nov. 1976), raising cognate questions as to the scope of a proper remedy. Here as there the question of the authority of a federal district court to take over, reconstruct, and manage state and local governmental educational units is raised. Appellees' contentions here are the same as

respondents' contentions there. The issues in this case, while factually distinguishable, present the same problem of excessive judicial interference and should be heard along with *Milliken v. Bradley*.

Respectfully submitted,

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**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF DELAWARE**

**MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-416

**DELAWARE STATE BOARD OF EDUCATION, ET AL.,
APPELLANTS**

v.

BRENDA EVANS, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF DELAWARE**

**MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether this Court has jurisdiction of the appeal from the judgment entered by the three-judge district court, and
2. Whether the district court erred by requiring a remedy for racial discrimination in the operation of the schools more extensive than is necessary to eliminate all of the effects of that discrimination.¹

¹This question is fairly comprised within questions two and three presented by the jurisdictional statement (J.S. 3). We take no position with respect to the first question presented by appellants, believing that it is foreclosed in substantial measure by this Court's summary affirmance of the judgment on the liability question. See 423 U.S. 963, affirming 393 F. Supp. 428.

The jurisdictional statements in No. 76-474, *Newark School District v. Evans*; No. 76-475, *New Castle-Gunning Bedford*

INTEREST OF THE UNITED STATES

The United States has an immediate interest in this case because the Court's resolution of the jurisdictional issues involved may affect the jurisdiction of this Court in *United States v. Board of School Commissioners of City of Indianapolis*, C.A. 7, No. 75-1730, decided July 16, 1976, appeals and petitions for a writ of certiorari pending, Nos. 76-212, 76-458, 76-468, 76-515, 76-520, and 76-522. In *Indianapolis* a single-judge district court ordered substantial inter-district reassignments of students. Similarly, in *Milliken v. Bradley*, 418 U.S. 717, a single judge ordered the consolidation of school districts. If the order here consolidating school districts and requiring the inter-district transportation of students could be entered only by a three-judge court, then the district court in *Indianapolis* (which declared unconstitutional a state statute's exclusion of metropolitan school districts from governmental consolidation) may have acted without jurisdiction, with the consequence that that case must begin again.² If, on the other hand, three judges were not required in either case, the appeal here properly lies to the court of appeals rather than this Court. *Butler v. Dexter*, No. 75-623, decided April 19, 1976; *Norton v. Mathews*, No. 74-6212, decided June 29, 1976.

School District v. Evans; No. 76-499, *Mount Pleasant School District v. Evans*; No. 76-500, *Marshallton-McKean School District v. Evans*; and No. 76-501, *Claymont School District v. Evans*, appear to present related questions concerning the district court's judgment, and we do not separately discuss them. Because of this relationship and the fact that the jurisdictional problems in the case pertain to all of the appeals, we believe that this Court's disposition of them should be governed by its disposition of No. 76-416.

²We have previously argued that the single judge had jurisdiction in that case. See *Metropolitan School District of Lawrence Township v. Dillin*, certiorari denied, 412 U.S. 953.

Moreover, the United States has substantial responsibility under Titles IV, VI, and IX of the Civil Rights Act of 1964, 78 Stat. 248, 252, 266, 42 U.S.C. 2000c-6, 2000d, and 2000h-2, and under the Equal Educational Opportunities Act of 1974, Pub. L. 93-380, 88 Stat. 514 *et seq.*, 20 U.S.C. (Supp. V) 1701 *et seq.*, with respect to school desegregation. The Court's resolution of the issues presented in this case would affect that enforcement responsibility. Although the United States did not participate in this case in the court below, it has participated, either as a party or as *amicus curiae*, in most of this Court's previous school desegregation cases, including *Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294; *Cooper v. Aaron*, 358 U.S. 1; *Goss v. Board of Education*, 373 U.S. 683; *Green v. County School Board*, 391 U.S. 430; *Alexander v. Holmes County Board of Education*, 396 U.S. 19; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Wright v. Council of City of Emporia*, 407 U.S. 451; *School Board of City of Richmond v. State Board of Education*, 412 U.S. 92; *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189; *Norwood v. Harrison*, 413 U.S. 455; *Milliken v. Bradley*, 418 U.S. 717; *Runyon v. McCrary*, No. 75-62, decided June 25, 1976; and *Pasadena Board of Education v. Spangler*, No. 75-164, decided June 28, 1976.

DISCUSSION

1. In March 1975 the three-judge district court in this case concluded that appellants had discriminated against students on account of their race, that the discrimination was "a cooperative venture involving both the city and the suburbs" (393 F. Supp. at 437), and that, as a result, it would probably be necessary to devise an inter-district plan for reassignment of students. The court also held that the Educational Advancement

Act of 1968, a Delaware statute, was racially discriminatory to the extent that it forbade appellant State Board of Education from consolidating school districts after 1969 or including the Wilmington and Newark school systems in any consolidated district (*id.* at 438-446). The court entered a judgment directing the parties to submit alternative inter- and intra-district student assignment plans (*id.* at 447). It also enjoined appellants from relying in the future on those provisions of the 1968 Act that had been found unconstitutional by the court. 423 U.S. 963, 963 n. 1 (Rehnquist, J., dissenting). This Court summarily affirmed. 423 U.S. 963.

The district court then received the plans submitted by the parties and concluded that, in light of the inter-district violations discussed in its previous opinions, only an inter-district desegregation plan would be sufficient (J.S. App. A15-A34). It held that the 11 school districts in northern New Castle County must be consolidated into a single school district, which will assume all of the educational and administrative functions of the schools. It did not select all of the districts to be included in this consolidated system on the basis of their participation in the inter-district violations; it relied, in addition, on information concerning the racial composition of the districts to be included, and it apparently chose some of the districts to be included with a view to producing a consolidated district with racial proportions that would, the court thought, enable desegregation to be "successful."

Within the new consolidated district students must be reassigned. The court stated that it "will consider that any school whose enrollments in each grade range between 10 and 35% black to be a [*sic*] *prima facie* desegregated" (J.S. App. A43, footnote omitted). The range of 10 to 35 percent black students for each grade in each

school (subject to variation in certain circumstances)³ was chosen to represent a range above and below a target of 21.5 percent, the percentage of students in the consolidated school district who are black. The court chose 10 percent as the lower bound for each grade in each school because it believed that a lower percentage "presents severe difficulties in the 'identity' of minority youngsters, who would not see fellow minority students in positions of leadership in the school" (J.S. A43, footnote omitted). The court chose 35 percent as the upper bound because a higher proportion of black students "is said to produce a substantial likelihood of white flight" (*ibid.*, footnote omitted). The court did not identify with any particularity the effects of the racial discrimination to be remedied, and the remedial standards it adopted are not constructed to produce the state of affairs that would have existed but for the racial discrimination in the operation of the schools.

The court entered a judgment (J.S. App. A72-A75) declaring that all of the school districts in northern New Castle County shall be reorganized into a single district and requiring the State Board of Education to design a student assignment plan consistent with the opinion of the court. It directed the State Board to appoint a five-member school board to oversee the consolidated district, and the court made certain other orders necessary to effectuate its plan. It then dissolved itself; jurisdiction over future proceedings was passed to a single-judge district court.

2. When this case was last before this Court, Mr. Justice Rehnquist wrote that it "veritably bristles with jurisdictional problems" (423 U.S. at 964). The Court's summary affirmance indicates that five Justices did not

³See J.S. App. A36, A43 n. 148.

share the doubts Mr. Justice Rehnquist expressed. We accept, as law of the case, the Court's resolution of the points Mr. Justice Rehnquist raised. But two other jurisdictional problems now affect the case. For the reasons discussed below, we believe that the judgment of the district court could have been entered by a single judge. Because the judgment here was not one required to be entered by a three-judge court alone, an appeal properly lies only to the court of appeals.

The injunction that was affirmed by this Court last fall forbade the appellants to rely in the future upon the 1968 Act, a state statute of statewide applicability. Whether or not that statute was *functus officio* at the time the injunction was entered was a question of state law; the district court has resolved that question in favor of the vitality of the statute. But the statute, so far as this case is concerned, expired when this Court affirmed the injunction against reliance upon it. The district court has not entered a further injunction against the operation of the state statute. None was necessary; its operation already had been enjoined, and that injunction had been affirmed by this Court. The three-judge district court therefore could have dissolved itself immediately upon the affirmance of its injunction. Three judges were not thereafter necessary to order the consolidation of the school districts in northern New Castle County.

Moreover, once this Court affirmed the issuance of the injunction barring reliance on the statute, the rationale for the requirement of three judges was satisfied. "Congress established the three-judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 97, footnote omitted. The

convening of three judges in the earlier stage of this case saved the 1968 Act from improvident doom at the hands of a single judge; it met its demise at the hands of three judges, and then at the hands of this Court. Surely there was no need for three judges thereafter simply to see to the interment. Indeed, once this Court affirmed the district court's injunction against reliance on the statute, its unconstitutionality was settled. Three judges are unnecessary to enjoin the operation of a statute where there is no doubt that it is unconstitutional. *Bailey v. Patterson*, 369 U.S. 31.

There is another reason why three judges became unnecessary after this Court's affirmance of the first injunction. The first injunction ran statewide; it forbade appellants to rely upon the statute to resist consolidation of school districts where that might be necessary as part of a desegregation plan. The injunction involved on this appeal, however, pertains only to northern New Castle County. It directs the State Board of Education to abolish 11 particular school districts and to create another in their stead (J.S. App. A73-A74). The judgment, by its terms, affects only part of the State of Delaware. Three judges are unnecessary to issue an injunction affecting only part of a state or of a state program. *Board of Regents v. New Left Education Project*, 404 U.S. 541; *Wolff v. McDonnell*, 418 U.S. 539, 542 n. 1.

3. We therefore conclude that this Court lacks jurisdiction of the appeal in this case. We believe, however, that this case is an important one in the evolution of the constitutional principles pertaining to racial discrimination in the schools, and that it should receive the attention either of this Court or of the Third Circuit as expeditiously as possible.

We believe that the remedial standards adopted by the district court in this case differ significantly from those that, under this Court's decisions,⁴ properly govern school desegregation relief. The district court's order is apparently founded on the assumption that the obligation to desegregate, triggered by the constitutional violation on the part of the school districts, means that the school districts must seek to achieve a racial balance in each school approximately equivalent to that in the district as a whole. Beginning with this premise the district court would allow adjustments, but these adjustments would in most cases be limited by the need for a "viable minority" on the one side, and, on the other, by the need to avoid "tipping points" that might lead to "white flight." The central point, however, is that, to the extent feasible, each school should have what the district court considered a desirable racial mix and, indeed, school districts were included in or excluded from the "desegregation area" on this basis.

In our view, this is not the right way to formulate a desegregation order. Instead, the proper task of a desegregation plan should be nothing more or less than the elimination, "root and branch," of all of the effects of official racial discrimination intended to affect the operation of the schools. The "desegregation" that courts are both empowered and obligated to accomplish is not, as the district court apparently thought, a degree of racial mixture thought socially desirable and hence ordered without reference to the actual amount of separation caused by the constitutional violation. The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination. A properly formulated desegre-

⁴See, e.g., *Milliken v. Bradley*, *supra*, 418 U.S. at 746; *Swann*, *supra*, 402 U.S. at 15-16.

gation decree should not, therefore, be based on a court's belief that such schools are undesirable, or that each school should have a racial mixture or balance.

The proper approach requires a court to seek to determine, as precisely as possible, the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects.⁵ That is the way fully to satisfy the constitutional command, in a manner consistent with the proper role of the judicial branch in rectifying constitutional wrongs. It is only in this context and for the purpose of achieving these objectives, that practicalities are properly taken into account in formulating a school desegregation remedy. For these reasons, which we have explained in greater detail at pages 14-18 of our brief in *Texas Education Agency (Austin Independent School District) v. United States*, petition for a writ of certiorari pending, No. 76-200,⁶ we submit that the district court here has erred in articulating the remedial standards to govern this case. Its judgment, which was based substantially on these remedial standards, therefore should not stand.

The principles we have articulated would, we believe, require a substantial amount of student reassignment in New Castle County. The district court concluded (393 F. Supp. at 433-438) that there have been significant and continuing inter-district acts of racial discrimination. In our view, these acts would require a significant inter-district remedy. Because no plan for student assignments under the district court's approach has yet been formulated, however, it is impossible to say how a plan designed under the principles we have set out would differ from a plan

⁵See, *Swann*, *supra*, 402 U.S. at 15-16.

⁶We are furnishing copies of that brief to counsel for the parties in this case.

complying with the remedial guidelines established by the district court. It seems safe to say, however, that it is highly implausible that, but for the acts of racial discrimination, every grade in every school in northern New Castle County would have been between 10 and 35 percent black.

4. Because the Court does not have jurisdiction of this appeal, the appropriate disposition of the case is to dismiss the appeal. Appellants already have filed a protective notice of appeal in the court of appeals (J.S. 7 n. * * *), and the case therefore could proceed there without further delay.⁷ If the Court dismisses the appeal, we will present our views as *amicus curiae* in the court of appeals.

Appellants have suggested, however, that if the Court dismisses the appeal it should grant a writ of certiorari before judgment to the court of appeals (J.S. 7 n. * * *). We cannot say that this case "is of such imperative public importance as to justify * * * deviation from normal appellate processes" (Rule 20 of the Rules of this Court). Cf. *United States v. Nixon*, 418 U.S. 683, 686 n. 1 (collecting cases). It may be, however, that in light of the pendency of the *Indianapolis* case, which presents similar issues concerning the appropriate principles for devising a remedy in school cases, the Court may think it best to hear both the instant case and *Indianapolis* together (if it should grant review in *Indianapolis*), in order to explore more fully the questions of remedy. We think that in these circumstances it would not be inappropriate to issue a writ of certiorari before judgment in the instant case.

⁷An order of a district court finding liability and requiring submission of a plan and consideration of a remedy ordinarily is an unreviewable interlocutory order (see *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737), and this is so in school cases no less than in others. *Taylor v. Board of Education*, 288 F. 2d 600 (C.A. 2). But where, as here, the district court has required school officials to take present action in response to its order, the order is injunctive in nature, and the granting of an injunction may be appealed even if the injunction is interlocutory. 28 U.S.C. 1292(a).

CONCLUSION

The appeal should be dismissed for want of jurisdiction. The Court may, however, wish to consider issuing a writ of certiorari before judgment to the court of appeals.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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